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THE COLONIAL SERVICE

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THE COLONIAL SERVICE

by

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of the Orthodox Patriarchate of Jerusalem

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PREFACE

THE following book represents a course of lectures delivered at the London School of Economics in the years 1928 and 1929. It is based partly on my personal experience of the Bahamas, Cyprus, Ceylon and Palestine, and partly on such investigations as I have been able to make of conditions obtaining in other countries.

All attempts to portray the Colonial Service must necessarily be imperfect. On this subject a Colonial Officer can only write adequately of his own experience in places where he has himself served. I shall be grateful to those who are serving in Colonies, Protectorates and Mandated Territories outside my own experience if they will correct and supplement any mistakes or imperfections into which I may have fallen.

At the time when these lectures were last delivered the *Ceylon Report* and the *East African Report* had been presented, but it had not yet been decided to what extent they were to be adopted. The references to them in these lectures are such as this situation necessitated.

Should they be adopted, they will start two new chapters in the story of British Colonial administration surpassing in interest anything that story has so far told.

ANTON BERTRAM

THE ATHENAEUM

Oct. 1929

NOTES

THE CEYLON CONSTITUTION

(See pp. 27–28, 59–60, 109, 184–192)

WHILE these pages were passing through the press, the constitutional question in Ceylon received important developments. (See *Correspondence regarding the Constitution of Ceylon*, 1929, Cmd. 3419.)

By his Despatch of June 2, 1929, the Governor, Sir Herbert Stanley, reported generally to the Secretary of State on the subject. He considered that the existing constitution had proved a qualified success, rather than an unqualified failure, that the picture presented by the Report of the Commission was "a little overdrawn," and that the description of the general attitude of the unofficial members towards the Government was too sweeping.

The local Legislature, having discussed the Report, had passed a series of particular Resolutions, which were "destructive of some of the fundamental principles, and subversive of the balance of the whole scheme" (p. 15).

Even with regard to the central principle of the scheme —Government by Standing Committees—the unofficial members, by the large majority of 23 votes to 8, had adopted a motion declaring that the Committee system was "not suited to local conditions," and was "unacceptable to the people" (p. 32).

He nevertheless thought that it was not the intention of the unofficial members to reject the scheme absolutely, and recommended that a formal offer should be made of a new Constitution based upon the scheme, but subject to a modification of its least acceptable feature, that of the franchise. To meet the difficulties caused by the existence of a large floating population of undomiciled Indian

labourers, he proposed that "domicile should be made the standard test" of the franchise.

The principle of universal suffrage should apply only to British subjects actually domiciled in Ceylon, and the suffrage should be confined to such persons, and those who could qualify under the existing franchise. Men and women should be put on the same footing.

The Secretary of State by his despatch dated October 10, 1929, approved generally of these recommendations of the Governor, and directed that a formal offer of a Constitution on these lines should be made to the existing Legislature. The number of elected members under the new Constitution was to be reduced to fifty.

On December 12, 1929, after several days' debate, the Legislative Council passed a Resolution accepting the proposed Constitution by the narrow margin of two votes. The numbers were 19 to 17. The official members and the Vice-President abstained from voting. The majority of 19 included three Europeans, and a European elected territorial member, Mr Freeman, an ex-member of the Ceylon Civil Service, who, by a rare tribute of respect, sits for the Province which he formerly administered as an official.

It will thus be seen that the scheme was carried by the votes of the representatives of the European community, and that the majority of the representatives of the permanent population of the Island confirmed the misgivings, which they had previously expressed.

The new Constitution involves many points of obvious difficulty, and others will no doubt present themselves as it proceeds, but as pointed out in an interesting leading article in *The Times* of December 14, 1929, the scheme has the unique merit of entrusting a measure of executive experience and responsibility to every member of the Legislature, including the representatives of those per-

manent minorities who, under any other system, would be in danger of complete exclusion.

All those who follow constitutional development throughout the Empire will watch with interest and sympathy the critical and arduous experiment on which the people of Ceylon have embarked.

THE EAST AFRICAN REPORT

(See pp. 28–29, 196–197, 257–259)

No official pronouncement as to the policy to be adopted by the British Government with regard to the questions discussed in the East African Report has been made at the date of printing.

It is understood that the Government will adopt the principal recommendation of the Report—the constitution of a Governor General, who will be the special representative of the Secretary of State in East Africa, and will be charged not only with the co-ordination of certain technical services, but also with the enforcement of a common native policy.

It is also understood that before being put into operation the Government proposals will be submitted to a Joint Committee of both Houses of Parliament, and also to the Permanent Mandates Commission of the League of Nations.

CHAPTER I

GENERAL GEOGRAPHICAL REVIEW

The realm of the Colonial Service; its nature and extent. (1) The West Indies and the Atlantic. (2) The Mediterranean and the Near East. (3) The Far East. (4) The Pacific Islands. (5) British Tropical Africa—The Colonial Regulations—*The Colonial Office List.*

THE REALM OF THE COLONIAL SERVICE; ITS NATURE AND EXTENT

THE theme of the present series of lectures is the government of that part of the British Empire which lies outside the self-governing Dominions, India and the Sudan, or, as it may otherwise be expressed, of that part of the Empire which comprises the "Crown Colonies",[1] the Protectorates and the Mandated Territories. My object will not be to give you a historical account of the development of their various types of government, nor to discuss the racial, economic and constitutional problems which they so freely present. It will be to put before you a picture of the general lines of their administrative machinery in its practical working—to give you a summary idea of what British government means in these various countries to those who conduct it and to those to whom it

[1] Crown Colonies are "colonies not possessing responsible Government, in which the administration is carried on by public officers under the control of the Secretary of State for the Colonies"—Tarring, *Law Relating to the Colonies*, 4th ed. (1915), p. 48. Sir Henry Jenkyns (*British Rule and Jurisdiction beyond the Seas*, p. 91) divides Colonies not possessing responsible government into two classes, viz. those which have a Legislative Council and those which have no Legislative Council. "The second class are Crown Colonies strictly so-called, though the term is frequently applied also to the first class."

is applied. What I have to say must necessarily be very condensed and very imperfect, but it will at least serve to introduce you to a subject which no student of political science ought to exclude from the scope of his studies.

We are deservedly proud of that great administrative instrument, the Government of our Indian Empire. It is an achievement of the first magnitude to have welded all the countries and peoples of British India into a great uniform State. From Lahore to Adam's Bridge, and from Bombay to the furthest confines of Burma, British India is now subject to a uniform system of administration, of criminal law, of civil and criminal procedure, and of other great departments of law embodied in codes, such as Contract, Limitation of Actions, Trusts and Land Transfer. The whole of this vast area is connected together by a common system of posts, telegraphs and roads, and (subject to the spheres of the provincial Governments) it is governed and controlled by the Viceroy's Council, the Council of State, and the Legislative Assembly sitting at Delhi or Simla.

But the signal feature of the system directed from the Colonial Office is not uniformity but variety. It has not a common framework but is a vital and various organism. Starting in the days before the American Revolution with a simple and supple instrument of government in the Colonies and settlements of North America and the West Indies, it has developed and adapted itself to the most complex and diverse local conditions. Each local Government is a separate unit. It would seem as though the chief concern of the Colonial Office all through its history had been to foster local individuality. As Mr Amery reminded us at the Colonial Office Conference of 1927:[1] "Strictly speaking there is, of course, no Colonial Empire, and no

[1] *Colonial Office Conference*, 1927, Cmd. 2884, p. 5.

such thing as a Colonial Service"... "I deal in this office", he said, "with some thirty-six different Governments, each entirely separate from the rest, each administratively, financially, legislatively self-contained. Each, whether it deals with nearly 20 million people over an area as large as Central Europe, or with 20,000 people on a scattered handful of islands, has its own Administrative Service, its own Medical Service, its own Agricultural, Public Works, and other technical Services, its own scale of pay, its own pensions."

Round each of these units there has clustered an active and manifold growth of customs, laws, regulations and institutions. "Each Colonial Government and each Colonial Service", continues Mr Amery, "has grown up on the spot by a continuous process of local evolution.... Each Government and each Service, therefore, is autochthonous, racy of the soil, adapted to local conditions, and instinctive in its understanding of those conditions, and in its sympathy with the population it administers."

And let no one depreciate this collection of Governments because some of them are small in population or area. Let it be borne in mind that the total extent of the regions governed by the Colonial Office is considerably more than twice that of British India, and that Nigeria alone has seven times the area of England and twice the population of Canada. But let it also be remembered that even in the smallest of these Colonies there is an active and intense local consciousness. Each has its own traditions, aspirations, contentions, and problems. Each has its own special pitfalls, trials, and possibilities of achievement for the administrator. In the art of government even the smallest place calls for the application of great principles. In small Colonies, just as much as in great, those engaged in their administration are perpetually engaged in upholding great

traditions, and in doing large things, though it may be on a small scale. Moreover the importance of a country is not to be measured either by its population or by its area. World-famous seaports like Singapore and Hong Kong, historic countries like Ceylon, Cyprus and Palestine are a more significant heritage than the deserts of the Sahara or Arabia or the vast regions of Siberia.

Various and multitudinous as are the historic races of India, they all have a common Oriental quality, but the sphere of the Colonial Office embraces races, languages and religions that belong to all the quarters of the globe. Never in the history of mankind has such a collection of picturesque and individual peoples been gathered under a single sway. Moreover these various countries, being for the most part set in the midst of the Tropics, are full of the most enchanting natural beauties, which, as we are only now coming fully to realise, are one of the world's greatest endowments. An administrative system which controls and harmonises these extensive and various elements is an instrument of government of which we may be legitimately as proud, as we are of the Government of India. As Mr Amery said in the speech above quoted:

> The conception of the Colonial Empire as an entity of its own...is one which is only gradually dawning upon the mind of the general public, and indeed, even on the minds of those who like ourselves, are directly connected with the conduct of Imperial affairs.

Let us then, before we address ourselves to the main subject of these lectures, attempt a summary survey of the situation, the area and the population of the various countries with which we are concerned. And may I suggest that in so doing we shall find it convenient, for the purpose of enabling us to form some conception of the extent of territory with which we are dealing, to arm our-

selves with a unit of area. Personally for this purpose I always find it convenient to take the area of England, which is approximately 50,000 square miles. And it may also be convenient to remember that the approximate area of Wales is 7500 square miles, that of Scotland 30,000 square miles, and that of Ireland 32,000 square miles.

The territories governed by the Colonial Office may be classified in five geographical groups. The first is that of the West Indies and the Atlantic (including Bermuda on the North and the Falklands on the South); the second consists of the Mediterranean and the Near East; the third of the Far East (from the Seychelles to Wei-hai-wei[1]); the fourth of the Pacific Islands; and the fifth and last, though by no means the least, of British Tropical Africa.

(1) The West Indies and the Atlantic

This group of Colonies consists, firstly, of the West Indian Islands (viz. the Bahamas, Barbados, Jamaica, Trinidad, the Windward Islands, and the Leeward Islands) together with Bermuda; secondly, of two Colonies on the mainland of South and Central America—British Guiana and British Honduras; and, thirdly, of the Falkland Islands and their dependencies. The Colonies comprised in it are under ten separate Governments, and as one of these, viz. that of the Windward Islands, is a federation of three islands with distinct institutions—Grenada, St Lucia and St Vincent—and another of them, that of the Leeward Islands, is a federation of five other islands, or groups of islands—Antigua, Montserrat, St Kitts, Dominica and the Virgin Islands—we may say that they

[1] See footnote on p. 8.

comprise sixteen separate governmental institutions.[1] Some of them have special dependencies of their own. Though these Colonies have now, as it were, fallen into the background of our Empire, I need not remind you of their great associations with our history and literature. Further, we have included in this group (as they cannot be included in any other) two Atlantic Colonies—Bermuda to the North and the Falkland Islands to the South. Each of these two Colonies has its special characteristics. The existence of the Falklands was forcibly recalled to us during the late war.

Their area and population may be roughly taken as follows:

(1) *The West Indian Islands and Bermuda.* About 12,500 square miles (or about a quarter of the size of England) with a population of about 1,800,000.

(2) *The Mainland Colonies.* Rather less than 100,000 square miles (or twice the size of England) with a population of nearly 350,000.

(3) *The Falkland Islands.* With their dependencies about 7500 square miles (or about the size of Wales) and a population of some 3500.

Thus the area of the whole group is somewhat less than 120,000 square miles and the population somewhat more than 2,000,000.

(2) The Mediterranean and the Near East

Nothing could be a greater contrast to the tropical seas, the verdant and luxuriant vegetation, the negro population and the British settlers of the West Indies than that presented by the group of ancient and historic countries which claim our attention under this title. In climate, in

[1] As noted elsewhere, the Leeward Islands, with a population of less than 150,000, support six Executive Councils and five Legislatures.

aspect, in historic atmosphere, in language, in religion they are as the poles apart.

They comprise, firstly, the fortress of Gibraltar, with an area of 2 square miles and a population of some 18,000; secondly, the famous island of Cyprus, with its Greek and Turkish inhabitants, 3500 square miles in area (equal to Kent, Sussex and Middlesex combined) and with a population of about 330,000; thirdly, Palestine, with an area of about 9000 square miles (one and a half times the size of Wales) and a population of about 840,000; fourthly, Transjordan, with a population of about 350,000 and with an area not yet computed; and, finally, Iraq, with an area of 116,500 square miles and a population of about 2,850,000. The area of the group (excluding Transjordan) is thus about 130,000 square miles and its total population about 4,400,000.

(3) The Far East

We next come to that region which we have perhaps somewhat comprehensively termed "The Far East". Taken from West to East its territories are, first, the archipelago of the Seychelles—with an area of some 150 square miles and a population of 25,000; second, the historic island of Mauritius, with its French associations and its mainly Indian population—its area 720 square miles (about the size of Surrey) and its population about 387,000; third, Ceylon, the most beautiful country in the Colonial Empire and still its proudest possession—with an area of about 25,000 square miles (or half the size of England) and a population of over 4,500,000; fourth, the extraordinary cluster of territories which we may roughly describe as British Malaya (the Straits Settlements, the Federated Malay States, the Unfederated States, and the other dependencies controlled from Singapore)—its area some

113,000 square miles and its population over 4,250,000; fifth, Hong Kong, which though in form a mere municipality on an island rock, is in fact one of the great seaports of the world, as well as a great centre of British trade and influence, and Wei-hai-wei,[1] a distant outpost, acquired in a time of confusion, whose existence is nowadays hardly realised by the Empire. The total area of these Eastern possessions is about 140,000 square miles and the total population over 10,000,000.

(4) The Pacific Islands

Fourthly we come to the islands of the Western Pacific Ocean—a region little thought about or visited, but rich in beauty and romantic interest. They consist of the Colony of Fiji and the island Protectorates that have been attached to it. They are spread, indeed, over a wide expanse of the ocean, but their total extent, Fiji included, is some 24,000 square miles—rather less than half the size of England, and their population is under 500,000.

Nor must we forget the little island of Nauru, one square mile in extent, with some 2000 inhabitants, for which we have a divided responsibility as Mandatory, and which has engaged the serious consideration of the League of Nations.

(5) British Tropical Africa

Finally we come to a region of an immense territorial extent, which has in our own days been the subject of an extraordinarily rapid development, and is the source of great imperial problems. Indeed, the centre of gravity of the whole Colonial Service may be considered to have swung in recent years into this quarter of the Empire.

[1] Since these lectures were delivered final arrangements have been made for the retrocession of Wei-hai-wei to China.

This great region may be conceived of in four subdivisions: first, the group of Governments under the High Commissioner of South Africa—Basutoland, Bechuanaland and Swaziland; second, our West African Territories, chief among which is the great Colony and Protectorate of Nigeria; third, the East African Territories, including the Protectorate of Uganda, the Colony of Kenya and the Mandated Territory of Tanganyika; fourth, Nyasaland and Northern Rhodesia, which constitute a special group of their own in Central Africa. Ascension, St Helena and Somaliland, three detached fragments, complete the whole. The areas of these great territories are on a scale vaster than anything to which the Colonial Office had been accustomed. In West Africa (as we have already noted), Nigeria alone is more than seven times the size of England —or, to vary the comparison, it is as large as the whole United Kingdom, Belgium and France put together, and about one-third of the size of British India. The Mandated Territory of Tanganyika is of the same dimensions. Kenya and Uganda taken together make up approximately a similar area. Thus these four territories, Nigeria, Tanganyika, Kenya and Uganda, are approximately of the same size as British India. The total area of our Tropical African Territories under the control of the Colonial Office is over 1,900,000 square miles—larger by 100,000 square miles than the whole of India, including the Native States. Its total population is over 36,000,000.

To summarise the position, then, we find the total area ruled by the Colonial Office is 2,325,398 square miles—46 times the size of England, and considerably more than twice the size of British India. Its population is approximately 53,000,000. The detailed effect of these figures may be seen in the following table.

AREA AND POPULATION OF THE COUNTRIES GOVERNED BY THE COLONIAL OFFICE

(Figures taken from *The Dominions Office and Colonial Office List*, 1926)

I. THE WEST INDIES AND THE ATLANTIC

Countries	Area (in square miles)	Population
1. The West Indian Islands (with Bermuda)	12,506	1,828,206
2. The Mainland Colonies (British Guiana and British Honduras)	98,078	348,336
3. The Falkland Islands	7,518	3,538
	118,102	2,180,080

II. THE MEDITERRANEAN AND THE NEAR EAST

1. Gibraltar	2	18,540
2. Cyprus	3,584	330,601
3. Palestine	9,000	842,000
4. Transjordan	—*	350,000
5. Iraq	116,501	2,850,000
	129,087	4,391,141

III. THE FAR EAST

1. The Seychelles	156	25,847
2. Mauritius	720	387,743
3. Ceylon	25,332	4,643,769
4. The Straits Settlements The F.M.S. The Unfederated M.S. Other dependencies	113,262	4,333,506
5. Hong Kong	394	597,300
6. Wei-hai-wei†	394	154,416
	140,258	10,142,581

* Not yet estimated.

† Now restored to China.

IV. THE PACIFIC ISLANDS

1. Fiji	7,083	166,988
2. Attached Protectorates, etc.	17,131	268,594
	24,214	435,582

V. BRITISH TROPICAL AFRICA

1. South African High Commissionership	293,394	775,333
2. West Africa	490,937	22,683,217
3. East Africa	725,120	10,081,909
4. Central Africa	336,193	2,323,423
5. Miscellaneous Territories	68,081	350,703
	1,913,725	36,214,585

Totals

I. The West Indies, etc.	118,102	2,180,080
II. The Mediterranean and Near East	129,087*	4,391,141
III. The Far East	140,258	10,142,581
IV. The Pacific Islands	24,214	435,582
V. British Tropical Africa	1,913,725	36,214,585
	2,325,386	53,363,969

BRITISH TROPICAL AFRICA IN GREATER DETAIL

I. SOUTH AFRICAN HIGH COMMISSIONERSHIP

Basutoland	11,716	498,781
Bechuanaland	275,000	158,152
Swaziland	6,678	118,400
	293,394	775,333

* Area of Transjordan not yet estimated.

II. WEST AFRICA

Countries	Area (in square miles)	Population
Nigeria (including Cameroons)	367,928	18,631,422
Sierra Leone	27,250	1,541,311
Gambia	4,069	211,223
Gold Coast, etc. (including Togoland)	91,690	2,299,261
	490,937	22,683,217

III. EAST AFRICA

Kenya	248,800	2,619,661
Uganda	110,300	3,145,449
Tanganyika	365,000	4,100,000
Zanzibar	1,020	216,799
	725,120	10,081,909

IV. CENTRAL AFRICA

Nyasaland	48,243	1,212,475
N. Rhodesia	287,950	1,110,958
	336,193	2,323,433

V. MISCELLANEOUS

Ascension	34	
St Helena	47	3,703
Somaliland	68,000	347,000
	68,081	350,703

THE COLONIAL REGULATIONS

Such then is the great and various realm which is the subject of our consideration. It may naturally be asked—Is there no great common code, laying down the powers and principles under which these widespread countries are administered? Imperial Statute there is none. There is

indeed a code of a very peculiar nature which applies to them all, and that is the "Colonial Regulations"—or, more fully expressed, the "Regulations for His Majesty's Colonial Service" to be found at the end of the *Dominions Office and Colonial Office List*. It is one of those characteristic collections of enactments which, according to our British practice, are gradually developed to meet requirements as they arise, or come to be realised. It classifies the Colonies and Territories under the Colonial Service, defines the position and privileges of the Governor, summarily describes their system of Councils and Assemblies, deals with the appointment, promotion, discipline, suspension and dismissal of officers, their salaries and their leave, and in particular with the salaries, leave and passages of Governors. Then comes a special section on "Leave and Passage Rules in West Africa". Next we are introduced to "Ceremonies", "Precedence" (a subject of great and burning importance in official life), "Medals and Decorations", "Statutes", "Flags and Uniforms", and after that to "Correspondence" in all its branches. At the close of this chapter we suddenly light upon a principle of great imperial importance—the right of the subject to address the Sovereign:

212. Every individual has the right to address the Secretary of State, if he thinks proper.

214. Petitions addressed to the King, or the King in Council... must be in like manner sent to the Governor for transmission to the Secretary of State.

215. The Governor is bound to transmit to the Secretary of State with all reasonable despatch every communication so received by him, accompanied by such report as its contents may appear to him to require.

Nor is this privilege a mere formal one. These petitions are all carefully examined, and every Colonial Officer of

experience must be able to recall cases in which local assumptions have had to be revised in the light of some discriminating act of justice emanating from the Secretary of State.

Finally comes a chapter which is the most important of the whole—that on "Finance". Its provisions are full, searching, rigorous and exact. To read them is to realise the firm grip in which the Colonial finances are held, the sound principles on which they are administered, and the highly expert knowledge and the careful thought with which the system has been devised and elaborated.

But it will be seen from this summary that these Regulations contain nothing of a legal or constitutional nature. They are really a collection of regulations for the information and instruction of officers of the Colonial Service. For the legal and constitutional foundations of the system of Crown Colony administration we must look elsewhere.

THE COLONIAL OFFICE LIST

But before we leave the subject of these Regulations it is necessary to draw attention to the important and familiar volume in which they are contained, the "Red Bible" of the Colonial Service, once known as *The Colonial Office List*, but now as *The Dominions Office and Colonial Office List*—a title which was surely not born for immortality.

In this are contained brief, complete, unimpassioned accounts of the situation, area, history, climate, revenue, special institutions, and constitutional developments of all the countries under the care of the Secretary of State. Each country has its own excellent and informing map. In connection with each will be found set out the names, and for the most part the salaries, of all the officers of the Government—except the subordinate clerical officers.

At the end, after a collection of interesting and comprehensive appendices, is a record of the public services of all the officers of the Colonial Service, giving notes of their careers from their school days onwards. Every student of Colonial administration should find time for at least a glance at this volume. Nothing could give him a better idea of what the Colonial Service means.

At the same time may I also suggest that all those who are pursuing this subject should procure for themselves a copy of that admirable volume, issued as one of a series giving an account of the various Government Departments—*The Dominions and Colonial Offices*, by Sir George V. Fiddes, Permanent Under-Secretary of State for the Colonies—a delightfully written and most authoritative book, exhibiting with the easy touch of the experienced Civil Servant a concise description of the organisation of the department, a history of its dealings with the various regions under its control, and an account of the chief problems which they have presented and are presenting. It should be read in connection with the present series of lectures.

CHAPTER II

THE GOVERNOR

The constitutional basis of Colonial Government; the Governor's Royal Instructions and Commission—Concentration of responsibility in the Governor—The Governor as the King's representative—The Executive Council.

The control of the Secretary of State; nature of Colonial Office Government—Impending changes; the Ceylon and East African Reports.

THE CONSTITUTIONAL BASIS OF COLONIAL GOVERNMENT; THE GOVERNOR'S ROYAL INSTRUCTIONS AND COMMISSION

WHAT then is the authority for the constitutional arrangements of our Crown Colonies, Protectorates, Protected States and Mandated Territories? So far as the Crown Colonies are concerned—the Protectorates and other Territories will be dealt with in subsequent lectures—it is to be sought in the system established in the American Colonies in the eighteenth century. On the appointment of every Governor to the Governorship of one of the Royal Provinces he was armed with two documents, the first a "Commission", in the form of "Letters Patent", passed under the Great Seal, and the second entitled "Royal Instructions" in the form of "Letters Close", passed under the Royal Sign Manual and Signet.[1] The commission was an authoritative prerogative Act, having legislative force. The "Instructions" were a supplementary document intended to instruct the Governor in the details of his powers and

[1] For an explanation of these expressions see *The Home Office*, by Sir Edward Troup, pp. 7–10.

duties.[1] These Commissions and Royal Instructions are still issued to all Governors—even to the Governors of the self-governing Colonies. In modern times, however, instead of declaring and defining the powers of the Governor at each successive appointment, it has been found convenient to constitute the office of Governor and define its powers by general Letters Patent (which can be amended as occasion requires), and to issue a Commission to the Governor, under the Royal Sign Manual and Signet, referring to these Letters Patent. As Sir George Fiddes observes, "the Letters Patent and Instructions together form a sort of Organic Law of the Colony".[2] They not only declare and define the powers of the Governor and instruct him as to the details of certain of his duties, but they actually lay down the lines of the political Constitution of the Colony which he is to govern.

[1] See Osgood, *The American Colonies in the Eighteenth Century*, vol. I, p. 34: "While the Commission was the authentic document to which a Governor or others must look for the source and general definition of his powers, the Instructions were intended for his guidance in particulars, so that the interest of the Crown might be made clearer and the general statements of all Commissions made intelligible". These early Instructions were in two sets—one relating to trade and the other to miscellaneous matters.

See also *ibid.* p. 37: "A fundamental point upon which there was disagreement, and one second in importance to none other, was that of the binding force of Royal Instructions. The Crown, or at least the Board of Trade, always contended that they were law in the full sense of the term, and were binding on Assemblies and the people as well as on the Governor. The Assemblies, however, when questions of great importance came to direct issues, refused to be bound by them. Their claim was that while they were law to the Governor, they could not bind the Colonists or the Assemblies except with their free consent".

[2] For a summary of the subjects with which in practice the Letters Patent and Instructions respectively deal, see Sir George Fiddes, *The Dominions and Colonial Offices*, pp. 45, 48.

CONCENTRATION OF RESPONSIBILITY IN THE GOVERNOR

This being the source of the authority of the Colonial Government, what is the nature of that Government? The Government of a Crown Colony consists of the direct personal rule of the Governor. All power and all responsibility are centred in him. After the necessary preliminary interval in which he is acquainting himself with local conditions, he personally directs and inspires the whole policy of his *régime*. Any matter that is of any importance is submitted for his order. Every act of the Government is done in his name. Every letter communicating a decision announces it as the decision of the Governor. To signalise his position, and to disentangle his orders from the web of official papers in which they are involved, he writes his minutes and signs his initials in red ink. By direct delegation from the Sovereign he is invested with the power of life and death and exercises the Sovereign's prerogative of mercy. His personality permeates the administration. It is the duty of all subordinate officers to efface themselves in the execution of his policy.

Not only is he the head of the Government—but he is also the centre of local society. His presence at any public function is a privilege. His influence, when exercised on behalf of any good cause—educational, social, philanthropic or religious—is incalculable. If his responsibilities are heavy and continuous, nothing is wanting which can give dignity to his position. He is received by the King to kiss hands before departing to take up his Governorship. His residence is "Government House" where every day he flies the Union Jack from sunrise to sunset (Colonial Regulations, No. 149). He is in many places attended on formal occasions by a body-guard. He has his personal

staff—a private secretary and as many A.D.C.'s as he requires for purposes of ceremony and hospitality. He is styled "His Excellency", and the National Anthem is played when he enters a public assembly. It is not without reason that in the Interpretation Ordinance of Ceylon, in the section which defines the meaning of various expressions in use in the Statute Book of the Colony, it is declared that—"'the Government' means the Governor". In the words of the Colonial Regulations (No. 4)—"The Governor is the single and supreme authority responsible to and representative of His Majesty."

THE GOVERNOR AS THE KING'S REPRESENTATIVE

Such being the position of the Governor, it will no doubt excite surprise that the question should have been raised whether he is the "King's representative" after all. Such is nevertheless the case. Judicial utterances are to be found which seem to challenge the position, and there are those who, from time to time for various reasons, seize upon these judicial utterances with a view to depreciating the Governor's status.

In the year 1879 a person bearing the name of Pulido instituted an action against the Governor of Jamaica, Sir Anthony Musgrave, in the Supreme Court of his own Colony, claiming damages for the seizure and detention of a schooner named the *Florence*.[1] The Governor put in a plea that he ought not to be called upon to answer in the action because the acts complained of were done by him as Governor and as acts of State. The object of the plea, as the Privy Council interpreted it, was to prevent

[1] 5 App. Cas. 102.

the Court from entering into an enquiry as to whether the acts complained of were within the scope of the authority of the Governor, and the Privy Council held that the Court was entitled to enter upon the enquiry and that the Governor must justify the acts so impugned.

In an earlier case, cited in the judgment of the Privy Council, *Hill* v. *Bigge*[1] (where the Governor of Trinidad was sued for a private debt), Lord Brougham declared: "If it be said that the Governor of a Colony is quasi-sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his Commission, and being only the officer to execute the specific powers, with which that Commission clothes him". Similar utterances were cited in cases where the act complained of was an official act.

But the truth is that we are dealing with a question of words. In one sense the Governor does not represent the King. The King has certain personal immunities. He cannot be sued in his own Courts either for a private debt or for a public wrong. He has certain prerogative rights. Thus, in conquered or ceded Colonies he has an autocratic power of legislation. The Governor has not by virtue of his office either these immunities or these prerogative rights. As it has been put, he is not a Viceroy. In this sense he is not the King's representative. He has only such authority as is conferred upon him by his Commission.

But in another sense this very Commission does make him the King's representative. It does not enumerate specific powers. It empowers and commands the Governor to do "all things that belong to his Office according to the tenor of the Letters Patent, his Instructions and the laws in force in the Colony". In effect the Commission vests

[1] 3 Moo. P.C. 465.

in the Governor all the powers necessary for the conduct of the Executive Government of the Colony in the King's name. In this sense he is assuredly the King's representative. To put it briefly—he represents the King, though he has not all the King's powers and privileges.[1]

The fact remains that by the judgment in *Pulido* v. *Musgrave* it is declared that the Governor is liable to be sued in the Courts of his own Government. It is not sufficient for him to plead his official position. To some extent at any rate he must justify himself. Whether it is sufficient for him to show that his act comes within the general scope of the authority of his Commission, or whether he must show that in the particular case that authority was in fact properly exercised, cannot be said to have been determined.

In practice the Governor is not sued. The laws of the Colony generally define the manner in which actions can be brought against the Government. The officer designated as the defendant for this purpose is usually the Attorney General.

Nevertheless, in recent Orders in Council, establishing the system of Government for the Mandated Territories,

[1] See Keith, *Responsible Government in the Dominions*, vol. I, pp. 115, 116.

For examples of Governor's Commissions and Letters Patent, see Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 212, 238. See also Fiddes, *op. cit.* pp. 45, 48.

In the Acts constituting the Commonwealth of Australia and the Union of South Africa the Governor General is expressly declared to be the representative of the Sovereign, without, it is submitted, his thereby being created a Viceroy.

In the Commission of the High Commissioner for the Federated Malay States he is authorised "to act in our name and on our behalf and in all respects to represent our Crown and authority in matters occurring within the said States and Territories". See Jenkyns, *op. cit.* p. 237.

precautions have been taken to secure the Governor, or the High Commissioner, against personal suits.[1]

THE EXECUTIVE COUNCIL

Power and responsibility are thus centred in the Governor, but it must be borne in mind that every Governor has his Executive Council. Almost all Governors' Instructions contain directions for the constitution of this body. It is the highest institution in the country, being in effect the Governor's Cabinet, and its members ordinarily take precedence next after the Chief Justice. It is one of the original institutions of our Colonial system. In the eighteenth century, in the Royal Provinces of North America, warrants were regularly issued for the appointment not only of the patent officers (the Colonial Secretary, the Attorney General and the rest), but also for the appointment of the Governors' Councillors, designated by the King.[2]

In pursuance of the characteristic flexibility of the Colonial Office system, the Executive Council takes all

[1] See, for example, Tanganyika Order in Council, 1920:

Art. 28. "(1) A Court under this Order shall not exercise any jurisdiction in any proceeding whatsoever over the Governor, or his official or other residences, or his official or other property.

"(2) This article shall not operate in bar of any proceeding against the Governor in his official capacity, when it is sought to establish any liability of the Government of the Territory."

See also Palestine Order in Council, 1922:

Art. 50. "The Civil Courts shall not exercise any jurisdiction in any proceeding whatsoever over the High Commissioner, or his official or other residence, or his official or other property."

[2] In Jamaica the Executive Council is styled the "Privy Council". In British Guiana until 1891 the administrative functions of an Executive Council were discharged by the Court of Policy. Northern Nigeria dispensed with an Executive Council till the amalgamation in 1914, and Uganda until 1920.

sorts of forms, according to local circumstances. In most cases it consists simply of the Governor's principal officers, who are members *ex officio*. Sometimes it includes nominated official members, sometimes nominated unofficial members, sometimes both. Sometimes, as in the Bahamas, there is a majority of unofficial members. But no Executive Council fails to include the Colonial Secretary, or the Attorney General, and in most cases it includes the Treasurer.[1]

The Governor is required by his Royal Instructions (and this circumstance is noted in the Colonial Regulations) to consult his Executive Council on all matters of importance, except in cases of urgency, or in cases of such a nature that in his judgment the King's service would sustain material prejudice by such consultation. But the Council is an advisory Council only. The Governor has the sole responsibility and he is entitled to reject its advice. Hence, singularly enough, where in an Interpretation Ordinance it is thought necessary to define the expression "the Governor in Executive Council" it must be declared that this expression includes "the Governor acting contrary to the advice of his Council". Where the Governor overrules his Council, he is required to report the circumstances to the Secretary of State. But such a thing, except in one sphere of importance (the confirmation of capital sentences), rarely happens.

Every Governor establishes an ascendancy over his Council. He attaches great weight no doubt to the opinions of his Councillors, official and unofficial, but his own opinion carries still more weight with them. The circumstances would be extraordinary indeed which would induce an Executive Council formally to set itself against his

[1] Osgood, *The American Colonies in the Eighteenth Century*, vol. I, p. 15.

considered policy. The cases in which the Governor adopts the opinion of the minority of his Council (except in the sphere referred to) are generally matters of trifling importance.

In an old-established and highly developed Colony it is impossible for the Governor to consult his Councillors on "all matters of importance" at a discussion round a table. Like the Governor himself they are all busily occupied men, and could not spare the time that such discussions would involve. Moreover, there are all sorts of questions, by no means of importance, on which the Governor is by law required to consult his Council. In almost every considerable legislative measure there is a section authorising the Governor to issue orders or to make regulations, or to fix dates for the purpose of carrying it into effect or of providing for exceptional situations. In all these cases it has an invidious air to confer powers for these purposes on the Governor alone. It is usual to confer it on the Governor and Executive Council. Legislative Councillors prefer it so. Moreover, in such a sphere as the acquisition of land for public purposes—even where the acquisition at issue is merely a narrow strip of roadway—it is thought necessary to invoke the Governor in Executive Council. Every new, every amending ordinance, every petty change in by-laws and regulations, every amendment of the official code of regulations known as "General Orders" have to go before the Executive Council. There is nothing for it but circulation of papers. The consequence is that leather bags, stuffed with voluminous papers, pursue the Executive Councillor, at all hours of the day and evening, into his office, into the recesses of his home, on his official tours, and on his week-ends in the hills—all with a demand for prior attention, so that the process of circulation may not be delayed.

Under these circumstances, on most of the questions so circulated, the task of the Governor is a simple one. The last member to advise is the Colonial Secretary. If there is any discordance in the advice so far minuted his experienced mind will know how to suggest the harmonising solution. Generally there is none. Some experienced Civil Servant will have given a brief and sage opinion and all the others will have followed suit. The Governor writes in red ink, "As advised by the C.S.", or "As advised by Mr B.", or simply "As advised". The paper goes back to the Secretariat for the necessary action and the consultation of the Executive Council is over.

Sometimes, however, among these circulating wallets are bulky bundles, perhaps distinguished by a special wrapper, which the Executive Councillor knows well. These are murder cases, containing the Police Court record, the judge's note and full reports from the prosecuting Counsel and the sentencing judge himself. These require careful study and cannot be disposed of by circulation, for they are matters of life and death. For these a special meeting is necessary. Of all the functions which a Governor has to discharge none, I think, is so solemn and dramatic as this. The prerogative of mercy is the Governor's highest endowment. As Sir George Fiddes has pointed out,[1] he holds it by direct and express delegation from the Sovereign and the Secretary of State makes no attempt to supervise its exercise. The case is discussed, and the question propounded—shall the law take its course, or shall the clemency of the Crown be exercised. The Councillors give their opinion, and it is then for the Governor to say whether he accepts the advice of the majority or the minority. The responsibility is his alone.

[1] *The Dominions and Colonial Offices*, p. 48.

THE CONTROL OF THE SECRETARY OF STATE; NATURE OF COLONIAL OFFICE GOVERNMENT

But if in the Colony the Governor is uncontrolled save by an advisory Council, his control from home by the Secretary of State is close and continuous. The annual estimates cannot be acted upon until they have been sanctioned by the Secretary of State (Colonial Regulations, No. 223). The Governor cannot propose to the Legislature the execution of any important public work until it has been submitted to and approved by the Secretary of State (*ibid.* No. 257). No addition can be made to the permanent service of the Colony without his consent. In the case of all appointments where the annual emoluments exceed £300 the selection is made by the Secretary of State, and the Governor's recommendation may or may not be followed (*ibid.* No. 33). All important developments of policy must be submitted and discussed. A succession of reports and returns must be rendered. Every new law must be transmitted with a report and certificate by the Attorney General.

The effect of all this is that every mail day a collection of carefully composed despatches is prepared in the Secretariat by the Governor's directions or in the terms of his own drafts. Each despatch, having been sent over to Government House for the Governor's personal signature, is transmitted to the Secretary of State. Similarly by every mail there arrives in the "Governor's bag" a collection of despatches containing the decisions and directions of the Secretary of State. The despatches of the Governor are generally full, reasoned, and expository, and are supported by confirmatory reports and documents. The replies of the Secretary of State are brief and concise

in form, framed in a style which long experience has perfected, distinguished alike by reserve and lucidity, at once considerate and conclusive.

By conferences, regional and imperial, by the appointment of special technical advisers, by the interchange of officers between the Colonial Office and the Colonial Services, by overseas visits of ministers and officials, by the encouragement of research—in every possible manner that experience has suggested, or ingenuity can devise—the Colonial Office equips itself for the discharge of its multifarious functions.[1]

Such then is the nature of the Government of the Colonial Office. Subject to certain local developments or survivals, it is government by a succession of carefully chosen and experienced autocrats, watchful and considerate of local public opinion, but not responsible to it, and controlled from a common centre by a high Officer of State. This Officer of State, for the purpose of that control, is instructed by an experienced department, which is the repository of long and enlightened traditions. He is himself responsible to Parliament, and in the case of the Mandated Territories the Government, which he represents, is responsible to the League of Nations itself.

IMPENDING CHANGES; THE CEYLON AND EAST AFRICAN REPORTS

Such indeed is the picture to which all members of the Colonial Service are accustomed. But of late there has been precipitated into the midst of this familiar region a disconcerting phenomenon—the Ceylon Report. Its

[1] See *Memorandum showing the Progress and Development in the Colonial Empire and in the Machinery for dealing with Colonial Questions* etc., Cmd. 3268, 1929.

proposals are such as to take away the breath of the experienced official. He no longer knows the Service in which he has been bred. Under the system recommended by this Report the Governor may fly the Union Jack from sunset to sunrise, but he does not govern. He does not even advise. Nor has he an Executive Council to advise him. Speaking summarily, his powers are limited to the exercise of powers of veto and suspension, to the consideration of capital sentences—and to such general executive functions as may be left to him under a *régime* in which the various spheres of Government are parcelled out among a number of Standing Committees. To such a *régime*, it is unnecessary to say, the descriptions of this chapter do not apply.

Yet another Commission has propounded a variation of the accepted model. In the Report of the "Commission on Closer Union" it is proposed that the Governors of Kenya, Uganda and Tanganyika shall be made subject to a new and imposing figure—the High Commissioner, or Governor General. This new Officer of State is to enforce a common native policy, approved by the Secretary of State; to co-ordinate certain services of common interest—in particular communications, customs, defence and research, and in Kenya is to have a super-legislative authority, by virtue of which he will be authorised to pass any certified measure over the head of the local Legislature. But this proposal, unlike that propounded by the Ceylon Report, is not revolutionary. It is a step in a natural development. The new officer will control, animate and assist the three local Governors, but will not subvert their authority or prestige. He will be in Africa a local projection of the Secretary of State, and in England, which he will visit every year, an exponent of the standpoints of Africa. The three local Governors will still remain the King's

representatives, governing under his Commission. The Governor General will be superimposed upon them but will not obliterate them. The Governors will still govern. Their relations with the Governor General are compared to those of the Provincial Governors with the Viceroy of India, but will be adjusted and defined by time and experience. Nevertheless this new proposal is one of the centres of controversy and it remains to be seen to what extent it will receive effect.

CHAPTER III

THE COLONIAL SECRETARY AND THE MACHINERY OF GOVERNMENT

The origin of the office of Colonial Secretary—His status; the Governor's chief lieutenant—His right to act as Governor—The normal approach to the Governor—His concentrated and multifarious duties.

The departments and departmental officers: (*a*) Administrative officers, (*b*) Technical officers, (*c*) Financial officers—The annual estimates.

The organisation of the Secretariat—The Secretariat Officer—The clerical service—*General Orders*—The Colonial Secretary at work—The Minute Paper system.

The position of the Colonial Secretary—Possible future developments—The Ceylon Report.

THE ORIGIN OF THE OFFICE OF COLONIAL SECRETARY

We have already seen that the roots of our modern Colonial Service are to be sought in the administrative system of the American Colonies in the days before the American Revolution. In the royal provinces of the American Colonies in the eighteenth century the authority of the Crown was represented not only by the Governor himself and such councillors as were designated to assist him, but by certain high executive Officers of State—the Secretary, the Attorney General, the Receiver General, the Surveyor General, as well as by the Justices of the Supreme Court, or at least the Chief Justice.[1] Royal Warrants were regularly issued for the appointment of all these officers.[2] Chief among these executive officers

[1] Osgood, *The American Colonies in the Eighteenth Century*, vol. I, p. 33.

[2] *Ibid.* p. 15.

was the Secretary of the Colony, or "Colonial Secretary". His office still remains as the first executive office of every Colonial Government controlled by the Colonial Office. In Nigeria, the Protectorates, Palestine and Tanganyika and the Federated Malay States he is known as the Chief Secretary, and it is in this form that as a general rule the office survives in the self-governing Dominions.[1]

HIS STATUS: THE GOVERNOR'S CHIEF LIEUTENANT

The Colonial Secretary is an officer of high dignity and importance. He is the Governor's chief lieutenant and Prime Minister. He is head of the Civil Service and (subject to the special precedence accorded to the Naval Commander-in-Chief and the Officer Commanding the Troops) ranks in precedence second only to the Chief Justice. He is in daily touch with the Governor, and his prestige is enhanced by the fact that if the Governorship is vacant, or the Governor absents himself from the Colony on leave, the Colonial Secretary in ordinary course assumes the Government of the Colony, and in such cases, in accordance with the provisions of every Interpretation Ordinance, all the statutory powers vested in the Governor under any Ordinance attach to the Colonial Secretary as the Officer Administering the Government.

HIS RIGHT TO ACT AS GOVERNOR

This right of the Colonial Secretary to act as Governor is always provided for in the Letters Patent constituting the office of Governor. Thus those of Ceylon (1921)—

[1] Newfoundland and New South Wales still preserve the title "Colonial Secretary".

Article X—declare, that in the case of any such vacancy or absence (in default of any special appointment)

the person for the time being lawfully discharging the functions of Colonial Secretary shall, during Our pleasure, administer the Government of the Island, first taking the Oaths hereinbefore directed to be taken by the Governor and in the manner herein prescribed; which being done, We do authorise, empower and command any such Administrator to do and execute all things that belong to the office of Governor and Commander-in-Chief according to the tenour of these Our Letters Patent, and according to Our Instructions as aforesaid and the laws of the Island.

Accordingly as soon as the Governor has left the territorial waters of the island, a meeting of the Executive Council is called. The Chief Justice attends and administers the oaths to the Colonial Secretary, and the new Administrator issues a proclamation announcing that he has taken over the administration of the Colony, and, in various forms, calling upon all the King's subjects to govern themselves accordingly.[1]

During his temporary *régime* the Colonial Secretary enjoys all the respect which is paid to the Governor himself. He not infrequently takes advantage of the occasion to travel through the Colony in his capacity as Officer Administering the Government and so to acquaint himself

[1] Like all rules of the Colonial Service this is subject to exceptions. Thus at one time, in Fiji, the place of the Governor during his absence was filled by the Chief Justice. So also on the death of Sir Malcolm Stevenson in 1927 the Chief Justice assumed the administration of the Seychelles. In 1912, when Lord Lugard undertook the amalgamation of the two Nigerias, he persuaded the Secretary of State to allow him to retain the Governorship during his annual absence on leave and to be represented in Nigeria by a deputy. The arrangement was terminated in 1917. See *The Dual Mandate*, pp. 107–9, and *Report on the amalgamation of Northern and Southern Nigeria*, Cmd. 468, par. 10.

personally with the desires of the inhabitants. It is of course his duty loyally to continue the policy of the Governor for whom he is acting, but on occasions of emergency, or during an interregnum he is from time to time called upon to take decisions of importance on his own initiative. It may be added in this connection that in every Colony of importance the Colonial Secretary generally comes to his duties with a very varied administrative experience, often derived from very diverse and distant quarters of the world, and that he is certain in due course himself to be appointed to a Governorship.

THE NORMAL APPROACH TO THE GOVERNOR

The Colonial Secretary is the normal and proper approach to the Governor. It is necessary for the Governor to observe a certain remoteness and detachment. A personal interview with the Governor on a matter of public business is in the nature of a favour and requires some special justification. But it is the business of the Colonial Secretary to be approachable not only to leading public officers, but also to prominent and representative members of the public. A question can often be advantageously advanced—or advantageously checked—by a personal interview of which the Governor has informal cognisance, and the result of which is afterwards informally communicated to him. So also it is only seldom and on special occasions that the Governor makes pronouncements on the policy of the Government. The Colonial Secretary, on the other hand, as leader of the Legislative Council, is continually called upon to answer questions, to meet attacks, to dissipate misapprehensions, to expound measures, and to justify policy—always in continual touch with the Governor in the chair. Further, he is continually in contact with

important local personages at meetings of Select Committees of the Legislative Council, where Bills are worked through in detail, and at meetings of Commissions at which he is from time to time called upon to preside.

HIS CONCENTRATED AND MULTIFARIOUS DUTIES

The duties of the Colonial Secretary in any considerable Government, both inside and outside his office, are thus at once arduous and multifarious. And let me add that whatever I say of the Colonial Secretary applies to the "Chief Secretary", wherever the corresponding officer is so styled, as in Nigeria and Palestine. He is the Secretary of the Colony. His office—the Secretariat—is the office of the Colony—the repository of its archives, and the centre of its correspondence. Into this office there pours a steady stream of letters and reports from every department and from every district of the Colony. In this office they are registered, studied, discussed and prepared for the necessary order. Through this channel alone all things that require the Governor's order are submitted for his consideration.

THE DEPARTMENTS AND DEPARTMENTAL OFFICERS

Before, then, we consider the personnel of the Secretariat and the working of its machinery, let us try to get some general idea of the departments and spheres of action with which the Secretariat has to deal. Nothing better deserves the attention of the political student than the immense expansion that in recent years has taken place in the scope of Colonial Government. In some of the old small Colonies, no doubt, the principal officials are a handful of people who can assemble in a single room, but in

extensive and advanced Governments they are reckoned in hundreds. Government is not a fixed machine, but is a constant process of development—of organisation and re-organisation. In such Territories as the Mandated Territories it has been possible in our own days to watch the great fabric of Government being built up or rebuilt, from its foundations.

We may classify the departmental officers under three heads:

(*a*) Administrative,

(*b*) Technical,

(*c*) Financial,

and we will consider in a class apart the District Officer, who partakes of or is concerned with them all, and who, in his own district, is the pivot of the whole.

(*a*) Administrative Officers

First among what we have described as "administrative officers" are those concerned with the Collection of Revenue. The "revenue officer" *par excellence* is, indeed, the "District Officer", but we are reserving him for future and special consideration. Apart from the District Officer the most important revenue officer is the Chief Officer of Customs. A large part of all Colonial revenue is derived from customs duties, both import and export. The Principal Collector has an officer in every port. If there is an excise system the Principal Excise Officer is also an officer of importance—and he must have an active and vigilant agency throughout the Colony.

Of equal importance are those officers whose duties relate to the public land. The sale or lease of Crown lands, the issue of Crown grants, the demarcation of waste or unsettled lands, the settlement of the boundaries of these

lands and the lands of individual owners, the numerous important problems that arise out of the land tenures of tropical Africa—all these matters require careful and judicious handling, and, in so far as they are not disposed of in the Secretariat itself or the District Offices, must be committed to carefully selected members of the general administrative staff. Of not less importance are the officers who in certain Colonies are charged with the supervision of the recruitment of labour and the protection of labourers, whether immigrant or local.

Next let us turn to another sphere of administrative action, the necessity of which one realises only by experience, and that is Registration. It is surprising what numerous things in a properly ordered Government require to be registered—births, marriages, deaths, titles to land, transactions relating to land, special legal instruments, judgments, companies, business names, patents, designs, trade marks, newspapers. New items are continually being added to the list. The work is dull and detailed but requires a careful responsible head.

To this same region of Government, perhaps, may be appropriately assigned the intricate and prosaic organisation of the Post Office, the Telegraphs, and the Telephones, with their rapidly enlarging accompaniments. In some places the superintendence of these services, as well as that of Registration, is assigned to some local person of capacity. In Ceylon it is entrusted to important members of the regular Civil Service.

Nor must we forget a humbler and equally necessary service—that of the Government Printer. He is, no doubt, replaced by a contractor in some countries, but in one form or other he is essential. Various as are his productions the climax of them is the *Government Gazette* with its weekly budget of appointments, promotions, Orders in Council,

Bills, Ordinances, Regulations, Notices, and Executions, without which some at least of the wheels of the Government could not revolve.

Lastly, among the administrative departments we must include those organisations attendant on the sphere of justice—Police, Prisons, and the execution of judgments. But of them we will speak more fully in another chapter.

And while we are dealing with this side of the work of Government, we must not forget that every Court of Justice has an administrative character. The magistrate or judge on the bench, indeed, has nothing to do but to declare the law, issue his orders and impose his sentences. But every Court has its registrar or other permanent officer, its records and record keeper, its clerical officers and apparitors. The appointments, promotions, transfers, and absences on leave of the judge or magistrate and these subordinate officers, as well as those of all other spheres of the administration, provide a constant supply of material for the attention of the Secretariat.

Revenue, Customs, Excise, Land, Labour, Registration, Posts and Telegraphs, Police, Prisons, the administrative side of the Law Courts, and last but not least the Government of the Districts, these are the ordinary spheres of the administrative officer, of various grades and qualities.

(*b*) Technical Officers

Let us now pass to the Technical Departments. It is here that the great development of the sphere of Government has been most pronounced and most beneficent. The maintenance of order, the administration of justice, the collection of revenue—these functions of administration have a comparatively cold and negative aspect when contrasted with the expanding, scientific, enriching activities of the great technical departments. Their staffs are every-

where steadily increasing. On these departments, when the development of a Territory is under consideration, attention is concentrated. In the proceedings of the Colonial Office Conference of 1927, out of 336 pages no less than 224, or about two-thirds, are devoted to technical subjects.

There is this to be borne in mind when we are thinking of these technical departments. Officers charged with the collection of revenue, the administration of the public land, the protection of labour or local administration, generally breathe a common atmosphere with the officers of the Secretariat. They have methods of work in common and share a common standpoint and *esprit de corps*. But the officers of the technical departments are professional men with special scientific and intellectual attainments and with standpoints of their own. They are engineers, doctors, scientists, educationalists.

The diversion of men with these special qualifications to the daily routine of office administration, their relations with the Secretariat at headquarters, with the District Officer and with the native authorities in the districts, in places where a rapid development is proceeding—all these things generate problems which were discussed at the Colonial Office Conference of 1927.[1] It is in the Secretariat that these problems are worked out. The successful

[1] See Memorandum in Appendix VII, Cmd. 2884, pp. 64–9. Among the expedients suggested in the Memorandum are the placing of administrative officers in charge of technical departments, the seconding of Secretariat officers for work in the offices of the technical departments, the specialisation of work of the Secretariat by assigning particular officers to the correspondence of particular technical departments, personal contacts and personal conferences, and emphasis is placed on the necessity of obtaining for the technical departments men of the same type and education as those who enter the administrative services.

harmonising of these various elements of Government is one of the things that must be set to the credit of the great system of administration, which is the theme of these lectures.

Let us then very briefly indicate the spheres of the most prominent of these technical departments. First and foremost comes the Department of Public Works ("P.W.D."), and its head the Director (the "D.P.W."). Its work is seen in every part of the country. It is responsible for the construction and upkeep of all the principal roads; for the planning, construction, maintenance and repair of all public buildings—including Government House—the various departmental offices, the Courts of Justice, the hospitals, the schools and the residences of officials. And this last item is much more important than might be supposed—it is of incalculable significance to the work of Government that Government officers should be decently and healthily housed. All schemes for comprehensive public works—such as electric power or waterworks schemes—belong to the domain of the P.W.D. When anything goes wrong with any of the practical and material arrangements of life it is the Public Works Department that is called in to set it right. In every developed country under the sway of the Secretary of State you may see, as you look around you, monuments of its constructive and civilising labours. It is necessarily a great employer both of regular and of casual labour. It must not only recruit this labour but also provide for its housing. It is thus a familiar word in the mouths of the people through the length and breadth of the country.

Next to the Public Works Department comes that of the Railway. And here there are in effect two separate departments—the first of construction, the second of management. In old and developed countries, such as Ceylon,

railways are important enough, but in new countries, such as those of tropical Africa, they are the very life-blood of the process of development. The railway brings all parts of the country into relationship, assists the maintenance of order, the administration of justice and the whole work of Government. But its prime advantage is that it makes possible the marketing and export of produce, and as a consequence the agricultural development of the country.[1] Without railways the great areas of tropical Africa would necessarily remain in a state of barbarism. Like the Public Works Department the Railway Departments, both of construction and management, are great employers of labour, and not of unskilled manual labour only. There is a station master at every station, proud to be a responsible member of the Government service. Every sort of executive and clerical ability or mechanical skill looks to the railway for employment. Opinion is unanimous that in our tropical territories all railways should be State railways. It is easy to see that these great organisations are an onerous addition to the responsibilities which centre in the Secretariat.

Next in importance among the great technical departments I would place that charged with the care of the Public Health. Medicine and Sanitation may be embraced in a single department or distributed severally among two. But in any case they are two halves of a single sphere. In every properly organised district there should be a qualified health officer. Even if we were concerned with our public officers alone—sent out with their wives and families to face the dangers of a tropical climate—it would be necessary to make provision for skilled medical assistance and hospital accommodation. But the problem to be tackled is far wider than that. Wherever there is agricul-

[1] See *Report of the East African Commission*, 1925, Cmd. 2387, pp. 10 sqq.

tural development on modern lines there must be a labour force; wherever there is a labour force there should be a hospital within reach. But quite apart from special labour forces, the whole population in these tropical territories is harassed and afflicted with endemic and epidemic sickness.[1] The establishment of Government control of the Tropics implies organised warfare against great and menacing diseases—malaria, yellow fever, sleeping sickness, elephantiasis, ankylostomiasis. So fully is this realised that in all the great tropical African Territories the Chief Medical Officer is a member of the Executive Council. Hospitals alone are not sufficient. They are supplemented by dispensaries served by humbler officers, known officially perhaps as apothecaries, but dignified by a grateful or credulous population with the title of "Doctor". Hospitals imply buildings, medical stores, instruments, surgical appliances, and, in addition to doctors, nursing sisters and attendants. The provision of all these things and the recruiting, leave, passages and pensions of these doctors and nurses are all part of the general work of Government.

Next comes the Department of Education, constantly presenting a series of insistent problems. In the old-established and smaller Colonies education may be a comparatively tranquil sphere and the preoccupations of Government may be limited to the supply of teachers and the upkeep of buildings. But in countries in process of rapid development (such as Nigeria) or in countries that

[1] It is an accepted fact that over 90 per cent. of the village populations of South India and Ceylon are infested with ankylostomiasis. See also generally *Report of the East African Commission*, 1925, pp. 53–61. The Commission laments the absence (except in Uganda) of any systematic attempt to provide native hospitals. But there has since been a marked advance.

are attaining to political self-consciousness (such as Ceylon) the questions to be considered tax the most earnest attention of the Government. The necessity of providing a clerical class qualified to assist in the work of administration—the danger of over-production—the task of establishing a public system of education upon the foundation of or in co-operation with the work so devotedly and zealously carried on by the missionaries—the necessity on the other hand of appreciating the point of view of those who, from the standpoint of their own faith, view missionary efforts with alarm—the importance of banishing a purely literary education from rural schools and of teaching arts and crafts and agriculture[1]—the respective spheres of the English language and the vernacular, and when there are contending vernaculars, what is to be done with them—finally, to pass to quite another sphere, what is to be done in the matter of university education[2]—if you will bear in mind that all these problems must be worked out and presented by the Director of Education, studied in the Secretariat, submitted to the Governor and circulated to his Council, if you will also bear in mind that this is but one of the many spheres with which the Governor is concerned, you will, I trust, acquire an added respect for our system of Crown Colony Government.

I must pass briefly over three other departments—Agriculture, Forestry, and Survey. The Director of Agriculture is responsible for the war against plant pests, experimental plantations, the establishment of co-operative

[1] See Lord Lugard's *Report on the amalgamation of Northern and Southern Nigeria* (1920), Cmd. 486, p. 170: "The education afforded will be restricted to the teaching of native arts and crafts, practical agriculture, carpentry, blacksmithing, with elementary hygiene and local geography, colloquial English and the rudiments of arithmetic".

[2] Lugard, *The Dual Mandate*, p. 455.

credit societies, and agricultural education both elementary and advanced. His department is a centre of research in such subjects as entomology and mycology. To the Forestry Department belongs the protection of the great public asset contained in the forests, its realisation for public purposes, its renewal by re-afforestation, the delimitation of forest reserves, their protection by forest guards and the administration of forestry regulations. As to the department of the Surveyor General—how little is its importance conceived by those who have not seen a new country in process of development! No Crown land can be granted or leased without a survey. For the delimitation of Crown lands, for the settlement of boundaries in dispute with private owners, for the acquisition of land for public purposes, for the extension of railways and roads, for the preparation of improvement schemes, the Survey Department is indispensable. It is by the work of the Survey Department that a Government first fully realises the country under its control.

We have attempted a very brief and hurried review of some of the more ordinary technical departments. Let it not be supposed that this is exhaustive. The technical officers vary with the circumstances of the Government. Some Governments have a Public Analyst, others a Department of Mines, others a Veterinary Department—museums, marine biology and meteorology are among the minor activities of Colonial Governments.

(*c*) Financial Officers

But before we return to the co-ordinating centre, the Secretariat, we have still to consider two officers of the highest importance in the scheme of Government. The first of these is the Treasurer and the second the Auditor.

The Treasurer is not to be thought of simply as the head of a department subordinate to the Colonial Secretary. Like the Attorney General, he is an officer of Cabinet rank, and in his relations with the Secretariat he is in the nature of an "allied and associated power". His duties are closely particularised in that exact and elaborate financial code which is to be found in the Financial Chapter of the Colonial Regulations.[1]

But in addition to the routine duties there enumerated

[1] See in particular § 218.

"It is the duty of the Treasurer—

(i) To see that the proper system of account is established in every department of the Colonial Government;

(ii) To keep watch on the receipts of the public revenue and as far as possible to secure its punctual collection;

(iii) To bring promptly to account, under the proper heads and items, all money, whether revenue or other receipts, paid into the Treasury or accounted for to him;

(iv) To see that proper provision is made for the safe keeping of all public money and stamps;

(v) To exercise strict supervision over all the officers of his department and sub-accountants entrusted with the receipt or expenditure of public money, and to take precautions, by the maintenance of efficient checks against the occurrence of fraud, embezzlement or carelessness in connection therewith;

(vi) To watch the expenditure and other disbursements of the Government; to take care that no payment is made which is not covered by proper authority, expressed or referred to on the voucher relating to it; and in case of any apparent extravagance, or of any apparent defect in the provision for a charge owing to the exhaustion or absence of a Vote, to call the attention of the Colonial Secretary in writing to the matter;

(vii) Promptly to charge in his account under the proper heads and items of estimate all disbursements of the Government; to render the accounts for audit, and to prepare the Financial Statements and Returns.

it is his business to provide for the local currency and the service of all loans, the calculation and allotment of pensions, and generally, both directly in his communications to the Governor, and in Executive Council, to act as the financial adviser to the Government.

The other principal financial officer of the Government is the Auditor. He is almost an independent power. His searching and all pervasive duties are defined and prescribed in paras. 349–78 of the Colonial Regulations. He may challenge the action of the Governor himself and the Governor cannot overrule his "maintained opinion" without reporting the matter for the decision of the Secretary of State (para. 378). His rigorous processes hang like a cloud throughout the year over the head of all the departments, and the green pencil, which none but he and his officers may use, figures conspicuously down all the pages of the Government accounts.[1]

It is these strict, severely defined and rigorously enforced requirements of Chapter v of the Colonial Regulations and the financial control by the Secretary of State for which they provide, that, more perhaps than any other factor, are responsible for the soundness and stability of our system of Colonial Government. No local control could be an effective substitute for that of the Secretary of State, and not one of the Colonies or Territories under the Colonial Office would claim that it possesses the qualifications for that financial independence which belongs to the responsible Governments of the self-governing Dominions.

[1] For the organisation of the Colonial Audit Department, which supplies and directs the Auditors of twenty-eight Colonial administrations, see Sir George Fiddes, *Dominions and Colonial Offices*, pp. 30–3.

THE ANNUAL ESTIMATES

No section of this chapter of the Colonial Regulations is more carefully worked out than that relating to the annual estimates. Each year every department or other authority for which financial provision must be made must send in to the Secretariat its own estimates in the prescribed form. A date for this purpose is fixed so as to allow the Colonial Secretary to prepare the general estimates for submission to the Legislature, and on their approval by the Legislature to allow of their submission to the Secretary of State in time for his reply to be conveyed by post before the commencement of the financial year to which they relate. The Colonial Secretary is responsible for obtaining the necessary materials for framing the estimates from the Treasurer and other heads of departments in time to admit of this rule being complied with (Regulation 224). It is by a Committee in the Secretariat that this information is studied, digested and co-ordinated. It is, then, by way of these annual estimates that we have returned to the Secretariat.

THE ORGANISATION OF THE SECRETARIAT

From the picture we have presented of the general machinery of Government, it need scarcely be observed that it would be impossible for the Colonial Secretary to cope with the stream of correspondence and reports necessarily concentrating upon him from all these offices, both administrative and technical, as well as from all the district officers, unless he were supported by highly qualified assistants, and a numerous and efficient clerical staff. Moreover, petitions, complaints and correspondence are part of the daily bread of Government and all direct themselves to the Secretariat as to the office of the Colony.

THE SECRETARIAT OFFICER

Hence arises the necessity for the Secretariat Officer. Every Colony, however small, has an Assistant Colonial Secretary, under one name or another, and every considerable Colony has several. In a large Colony the work required from an Assistant Colonial Secretary demands the best brains in the administrative service. Every question has a history or at least a precedent. If a petition or report is to be presented for orders, it must be presented in the light of that history or that precedent and of the legal, financial or other principles that affect it. From time to time stages present themselves at which an active-minded and discerning officer can concentrate the past history of any subject in an illuminating minute or memorandum, which becomes a landmark for the purpose of dealing with the subject in the future.

It is the function of the Secretariat Officer in relation to the District and departmental Officer to exercise that co-ordinating and discriminating insight which the Colonial Office exercises in relation to the various Colonies which it governs. The point of view of the District or departmental Officer may be liable to become local or particular. It is the business of the Secretariat Officer to preserve a position which is balanced and general. The best possible training for a Secretariat Officer is to have served for at least some time in the districts, and in the same way the best possible training for a District Officer is to have had some experience of the working of the Secretariat. In such cases the Secretariat Officer acquires an insight into the difficulties of the District Officer, and the District Officer knows instinctively what can and what cannot be

considered at headquarters.[1] In a country like Ceylon where the number of District Officers is comparatively small (nine Government Agents, and eleven Assistant Government Agents) it is easy for an appreciable proportion of the District Officers to obtain Secretariat experience and *vice versa*, but in a great territory like Nigeria, where there are forty Residents, and 294 District and Assistant District Officers, it is only a small proportion of the whole that can be singled out for Secretariat service.

It is the business of the Secretariat Officer, then, to deal with matters assigned to him, to dispose of those which are of a routine nature, and to prepare those requiring an official decision for submission to his chief, through the principal Assistant Secretary. But just as his chief cannot do his work without assistants, so the assistants cannot do their work without the clerical staff, and this brings us to a sphere of the Secretariat organisation, which must not be left out of account.

THE CLERICAL SERVICE

The clerical work of any considerable Secretariat requires a large regiment of clerks, not only for the purpose of typing correspondence and copying documents (though of these things there is much) nor merely for the regi-

[1] For a biting, unfriendly and unfair characterisation of the Secretariat Officer as compared with the District Officer, see Temple, *Native Races and their Rulers*, p. 189: "In the morning he is called and fed by native boys, who are nearly always out of touch with their own people. He goes to his work, which is done with pens, ink and papers.... In the course of his work he comes in contact with a few native clerks....He is fed at midday and returns to his work. In the evening he takes exercise for the sake of his health with other Europeans. He is fed again and goes to bed. This he does for 365 days and then gets into a steamer and goes home....He goes on for 18 years. He retires."

stration of incoming and outgoing papers (though this is a task at once essential and exacting)[1]—but also for something more than mere mechanical assistance. The Clerk in Charge of any particular subject, whether in the Secretariat or any of the departments, has a knowledge and experience which often enables him to be of the greatest possible value to the officer he is assisting. Précis writing, the preparation of draft letters on the basis of brief official minutes, the writing of memoranda of precedents, all come into his day's work. The Chief Clerk is a most important personage, both in the office and in the world outside it.

All that has been said on this point about the Secretariat applies to the departments and the District Offices. The work of Government in fact requires a large army of clerical officers, who read and write English with skill and facility, and they are necessarily drawn from the permanent population of the country. When a territory is in process of rapid development the demand sometimes exceeds the supply. Lord Lugard, writing in 1922, says that in Tropical Africa there is "an unlimited demand" for this type of public officer.[2]

As a general rule, however, sooner or later, instead of an

[1] Sir George Fiddes tells us that in the Colonial and Dominions Offices themselves it is necessary to employ fifty to sixty persons simply for the purpose of the registration of papers. See *The Dominions and Colonial Offices*, pp. 18–19.

[2] "The progress made in the development of Africa would have been impossible were it not for the enormous number of Africans who fill posts in which a knowledge of English, of reading, writing and arithmetic, and to a lesser degree of book-keeping and accountancy, is required"—*The Dual Mandate in British Tropical Africa*, pp. 442–3. See also his *Report on the amalgamation of Northern and Southern Nigeria*, 1920, Cmd. 468, p. 169: "the almost unlimited demand for teachers, clerks, accountants, etc."

unlimited demand there is a serious over-production. The fact that in the Gold Coast no less than 1000 candidates sat for a recent local civil (presumably clerical) examination seems to indicate that the position in Nigeria in 1922 is not to be taken as typical of West Africa to-day.

In every considerable Government it has become necessary to organise a regular Government clerical service, to establish standards and to impose examinations—in some cases qualifying, in others competitive.[1] The prestige that attaches to the Government service in bureaucratically governed countries is immense. No ordinary resident of Great Britain can gain any conception of it. It is the ambition of every educated young man, not possessed of other special qualifications, to enter the Government clerical service, if not by one of the permanent posts, then at least by one of the numerous incidental posts that are from time to time presenting themselves.

In spite of the elaborate efforts that are made to appoint and promote the best entitled men, the aspirant has a firm conviction that the appointments and promotions are made by personal influence, and that if he can only induce some important official to write a personal letter on his behalf his future is secure. No young man in such a country, who succeeds in attracting the personal interest of any important official—whether through a literary society or some form of sport or other social co-operation—fails to apply to the official in due course to use his personal interest to secure an appointment or promotion in the clerical service either for himself or for one of his relations.

The significance of all this in the present connection is not merely that the clerical service is an important ele-

[1] See Memorandum on "Examination Standards for local entry of Clerks etc.", *Colonial Office Conference, Appendix to Summary of Proceedings*, 1927, Cmd. 2884, pp. 230–9.

ment in the machinery of Colonial Government, but that the direction of the whole of this service—its appointments, transfers, promotions and dismissals—lies in the sphere of the officers of the Secretariat, and claims no small share of the time and attention of the officer or officers to whom it may be assigned.

GENERAL ORDERS

One other institution requires mention to complete the picture of Secretariat control and that is that all-embracing and intimidating volume known as *General Orders*. In this volume all the countless decisions, orders, procedures, and practices of the past have been woven into a complete local administrative code, which the public officer—administrative, technical, or clerical—will neglect at his peril. It is a net which is constantly being made more detailed and intricate. Witness the numerous amendments of General Orders which are fabricated in the Secretariat, circulated in Executive Council, published in the *Gazette*, and printed on slips for insertion in the volume of *General Orders* to be found in all the departmental offices.

THE COLONIAL SECRETARY AT WORK

Having thus obtained a general conception of the Secretariat, the elements of which it is composed, their respective functions, and the sources from which matters demanding its attention are showered upon it, we are now in a position to return to the Colonial Secretary himself, to conceive of him as seated at his chair in his office, and to consider the work he is called upon to do.

It will have been realised that much that comes into the Secretariat is disposed of by subordinates as being matter of routine. A certain body of work may have been delegated to Assistant Secretaries, according to the policy that

local circumstances may justify, but anything which requires a decision of Government or of which Government must take note, attains the dignity of a Minute Paper. The table of the Colonial Secretary in any important Government is every day loaded with Minute Papers. As he sits disposing of them in the intervals between personal interviews, messengers bring in fresh supplies. He takes masses of them home with him to work at after dinner or in the early morning, and they are the necessary accompaniments of his week-ends in the hills. Of the Executive Council papers that pursue him to these retreats I have already spoken.

The Minute Paper is so much the breath of the daily life of the official working at headquarters that it would never occur to him to stop and analyse its nature, but, as it is a definite part of the machinery of Government and is in fact the actual instrument by which the policy of Government is considered and the orders of Government are made, it may be worth while for us to pause and spend a few minutes upon it.

THE MINUTE PAPER SYSTEM

A Minute Paper may be started in all kinds of ways—a report from a District Officer—a petition from the inhabitants of a village—a scheme of development put forward by the head of a technical department—the announcement of some legal complication by the Attorney General—a resolution by the Legislative Council. Or again it may be something quite small, such as an application for leave. Or yet again it may originate above—from the Governor himself, who on one of his tours in the country has observed some matter requiring consideration—or finally in a despatch from the Secretary of State.

Let us suppose, however, something originating from

below. It is referred to an Assistant Secretary, and it is apparent that it will form the subject of a Minute Paper. He endorses the necessary order on the document, and the matter is submitted in the proper form.

The matter may be so important that it must be put before the Colonial Secretary and transmitted to the Governor at once. Coloured slips of paper marked "URGENT", or "IMMEDIATE" are on every Secretariat Officer's table. Often, however, some other enquiry is necessary. The Assistant Secretary writes a minute directing a reference to some other officer—perhaps to the head of some other department concerned, or to a District Officer—perhaps to the Treasurer for financial advice, perhaps to the Attorney General for a legal opinion. The Report in due course comes in with supporting documents—another minute is written, putting the pros and cons and submitting a recommendation, which is passed to the chief Assistant Secretary, and passed by him, with his own comment, to the Colonial Secretary, who submits it with his own recommendation to the Governor. Below the recommendation of the Colonial Secretary the Governor minutes his own order, *in red ink*, and, if the matter is a simple one, it goes back to the Secretariat for the drafting of the necessary letter which in due course is submitted to the Colonial Secretary for his signature, announcing "I am directed by His Excellency the Governor to inform you, etc., etc." Or if the order involves a letter to the Chief Justice, or a despatch to the Secretary of State, it is drafted in the Secretariat and submitted to the Governor for signature, unless in the latter case the Governor thinks fit to draft it with his own hand.

Things may take another course. The Governor may direct some interim action—the circulation of the Minute Paper to the Executive Council, or its submission to a

formal meeting, the appointment of a Commission or Committee of enquiry, the drafting of a Bill by the Attorney General. All these things may involve further reports and circulations until the story is finally brought to a conclusion by another red ink signature of the Governor.

Speaking generally a properly designed Minute Paper should contain the whole history of the subject,[1] except in so far as it is contained in a previous Minute Paper, which in that case is submitted with it. It consists of two parts—the Minutes, which should all come at the beginning, and the documents which should all be collected in order at the end. The Minutes are written by the Governor, the Colonial Secretary, the Secretariat Officers, the Attorney General and the Treasurer, if as often happens the whole Minute Paper is referred to them. In the case of other officers special detached documents are generally referred to them, and their replies are not in the form of minutes on the main paper, but in that of "Reports", which are collected with the "documents" at the end. I speak of the practice of Ceylon.

It will thus be seen that nothing goes before the Governor except with a recommendation of the Colonial Secretary, and that nothing is put before the Colonial Secretary except with a recommendation by the principal Assistant Secretary.

Indeed, so multitudinous are the matters which are submitted for decision, and so great is the daily pressure

[1] In Ceylon in my own day the officers perusing the Minute Paper were assisted by the luxury of a perfectly composed and beautifully written précis, running right through the Minutes, and filling up the gaps by reference to the documents in the Appendix. It was the work of two members of the clerical staff of most distinguished abilities and experience. I look back upon it with admiration.

at which work is done, that a judicious and experienced principal Assistant Secretary is able in a great many matters himself to direct the Government of the Colony. A lucid, concise, sagacious minute submitted at the right moment to his overburdened chief may be readily adopted, passed up to the Governor with the minute "Y.E. *submitted*", initialed by the Governor, and the thing is done. Or even if an order has been already made, the soundness of which he suspects, the principal Assistant Secretary may judiciously hold up the paper, re-submit it at the appropriate moment, point out the difficulties involved in action, and the conveniences of inaction, and the dubious proposal sinks into its grave. The tact, the judgment, the concentration, the versatility required from a principal Assistant Colonial Secretary are without limits. No praise can be too high for one who accomplishes his duties with efficiency. His chair is the seed plot of future Governors.[1]

THE POSITION OF THE COLONIAL SECRETARY

From all that has been said above it will have been realised that the two most distinguishing features of Crown Colony administration are firstly the centralised authority and responsibility of the Governor, and secondly, the concentration of all approaches to the Governor by the channel of the Colonial Secretary. This is not the system of the Government of India. The Government of India is a Government of portfolios. The chief spheres of

[1] Four of the last principal Assistant Colonial Secretaries of Ceylon are now, respectively, the Governor of the Gold Coast, the Colonial Secretary of the Straits Settlements, the Governor of the Gambia and the Colonial Secretary of Hong-Kong: one of them, recently deceased, was successively Governor of Cyprus and Governor of the Seychelles.

Government are apportioned among the Members of the Viceroy's Council. Each Member has his own Secretariat, in charge of an experienced officer of the Indian Civil Service. All ordinary matters within his sphere are dealt with by the Member, with the assistance of the Secretary, on his own authority without reference to the Viceroy, only important matters of principle being referred to the Viceroy in Council. To a great extent therefore the Members govern without reference to the Governor-General.

The whole question of the position of the Colonial Secretary has recently been dealt with in an extremely interesting Memorandum by one of the most distinguished members of the Colonial Service, Sir Hugh Clifford, now Governor of the Straits Settlements, and High Commissioner for British Malaya. This Memorandum is published in connection with the proceedings of the Colonial Office Conference of 1927.[1]

Having recalled the fact that "under the Crown Colony system the Governor for the time being is personally and directly responsible to the Secretary of State for the Colonies for the good government of the territory under his administration", he proceeds:

> The responsibilities thus laid upon the Governor being of so direct and personal a character, it became necessary in the Crown Colonies to devise administrative machinery that should enable him to exercise direct control and supervision over every public department; and to this end the Colonial Secretariat was brought into being.
>
> This office is presided over by the Colonial Secretary, who occupies, *vis-à-vis* the Governor, very much the same position as the Commander of a battleship in relation to her Captain. Thus it is to the Colonial Secretary rather than to the Govern-

[1] See *Appendices to the Summary of Proceedings*, 1927, Cmd. 2884, pp. 69–72.

ment that heads of departments and prominent members of the local public go in the first instance for assistance, direction or advice in matters of difficulty or emergency; and where the system is working, as it was designed to work, the Colonial Secretary is in such close touch with the Governor, so completely in his confidence, and so intimately acquainted with his wishes and opinions regarding public affairs, that in the majority of cases he can deal on his own responsibility with questions brought before him, which demand prompt action or decision, merely reporting to the Governor what he has done for covering sanction. None the less, it was an essential feature of the Crown Colony system that the Colonial Secretary should not himself be vested with any executive authority. He is the Governor's principal adviser; his mouthpiece through whom all his orders are issued; the official channel of communication with him, alike for the members of the public service, and for the general public of the Colony; and the principal spokesman of the Government in the Legislative Council. He has no power, however, to give any instructions to any public servant, with the exception of those serving as his immediate subordinates in the Secretariat, save in the Governor's name or by his direction; but he is the pivotal part of the administrative machine by means of which the work of all the public departments is co-ordinated, supervised and controlled. Through his agency also the Governor is kept fully informed of all that is going on in the Colony, and is enabled to exercise his authority and to discharge his responsibilities.

If I may be allowed to criticise the words of an old friend and colleague, there is one observation in this passage to which I take exception. The Colonial Secretaryship was not devised to enable the Governor to exercise control over every public department. It originated long ago in the American Royal Colonies of the eighteenth century. The Colonial Secretary was simply appointed as Secretary for the Colony. The various departments clustered round the Secretariat as the sphere of Government expanded. But, subject to this submission, the passage, emanating as it does from one who, in the Colonies in which he so served,

was always regarded as a singularly powerful Colonial Secretary, is surely entitled to be considered the *locus classicus* on the administrative status of the Colonial Secretary and deserves to be rescued from the pages of the Blue Book in which it is at present embedded.

POSSIBLE FUTURE DEVELOPMENTS

Sir Hugh Clifford goes on to say that during the last decade and a half the volume and the complexity of Government activities in some of the larger Crown Colonies have increased so enormously that the amount of work devolving upon the Colonial Secretary personally has become too great for any single individual, no matter how able and energetic, efficiently to discharge.

> In a Colony such as Ceylon...the intolerable burden of labour and responsibility now laid upon him is far greater than any public servant, in the Tropics or out of it, should be allowed to assume.

He propounds as a possible solution the system in force in the Provincial Governments in India, which is akin to, though not identical with, that of the Viceroy's Government. No formal consideration of the suggestion appears to have been taken at the Conference. Personally I view this proposal with very great reserve. If it ever came about in any great Colony or Territory under the Colonial Office that any considerable part of the ordinary work of Government was carried on either by the Governor on the report of the holder of a portfolio without reference to the Colonial Secretary, or by the holder of a portfolio without reference either to the Colonial Secretary or the Governor, this would mean the disestablishment not only of the Colonial Secretary but also of the Governor, as we have hitherto known them both. The system of Colonial

Government with which we have been familiar would in that Colony or Territory be at an end.

THE CEYLON REPORT

In Ceylon the axe has already been laid at the root of the tree. There is an ominous sentence early in the Report of the Commission on the Constitution:

> There can be no doubt that the system has outlived its usefulness and is to-day a source of delay and inefficiency, which adds to the difficulties of heads of departments and calls for drastic action (p. 30).

What this sentence foreboded, was fulfilled in the proposals of the Report. The Colonial Secretary is to be abolished and replaced by a Chief Secretary—who is to be a mere "administrative adviser". He presides over the Board of Ministers but without a vote. He no longer holds all the threads of Government in his hands. He is no longer the channel for communication. He administers a group of departments of his own—External Affairs, Maldive Islands, Defence, Drafting of Legislation, Public Service Administration and Audit.

It remains to be seen whether these proposals are to be put into force. If they are—Ceylon will know the Colonial Secretary no more.

The Colonial Office system of Government is always subject to all possible exceptions. No contrast is too great to be inadmissible. The system evolves in the direction to which experience points the way. In Nigeria there is such an exception. That great country besides its Governor, and the General Secretary to Government, has two Lieutenant Governors, each with a sphere of his own, and each with an independent Secretariat. It is possible that further experience may evolve yet further exceptions

destined to alleviate that pressure which Sir Hugh Clifford deplores.[1]

At present (April, 1929) both in large and small Governments the Colonial Secretary (or, as he is variously termed, the Chief Secretary) survives with all his original status. Like the Governor himself, he deserves to be contemplated and respected, as one of the successful administrative achievements that have been evolved by British imperial experience.

[1] See special article in *The Times*, Aug. 23rd, 1929, on "Nigeria of To-day—The Administrative Machine" for an interesting discussion on the development of the Nigerian administrative system.

CHAPTER IV

DIRECT AND INDIRECT RULE

I. The District Officer

Duties of the District Officer—His many-sided functions—His office appears in all parts of the Empire—His evolution in the Bahamas—The District Officer in Tropical Africa—Tributes to his qualities—Direct Government.

II. Indirect Rule

Nature of indirect rule—Indirect rule in Northern Nigeria—Three essentials: (1) a Paramount Chief, (2) a Native Treasury, (3) Native Courts—Legislative machinery—Administrative machinery—Justifications and criticisms—Indirect rule in Southern Nigeria and the Cameroons—The Gold Coast—Sierra Leone—East Africa: Uganda, Tanganyika, Kenya—The Malay States—The Pacific.

I. THE DISTRICT OFFICER

We now come to an officer on whose character and efficiency the whole framework of Government depends. A Colony may be so small in area that it can be administered from a single centre. But all, or almost all countries of appreciable magnitude must be divided into Districts, and this brings into being the District Officer.

DUTIES OF THE DISTRICT OFFICER

It is of the essence of this officer that he is in direct touch with the people, whose interests are entrusted to him. He represents Government in their midst, and holds all its strings in his hands. The district is his district and his business is to know it personally—to escape from time to time from the shower of petitions, reports, letters and forms that descend upon his office—to travel through the length and breadth of his territory, to learn the character-

istics of all its villages, to talk to the people in their own language when they assemble to receive him or when they approach his quarters individually with requests or complaints, or when they join him in his expeditions into the jungle, guiding his steps, or carrying his gun.

HIS MANY-SIDED FUNCTIONS

As an official he is in direct touch not only with the central Secretariat, but also with the local representatives of all the departments. Often he himself is the local representative of many of them. He may be the local postmaster, harbour master, collector of customs, district registrar, chief of police and superintendent of prisons. The public land of his district is his peculiar care, and it is his business to watch, if not to regulate, the conditions of labour. In many places it is inevitable that he should combine judicial functions with executive, and in such cases he is the local magistrate or local judge or both.

The operations which the technical departments—public works, railways, public health, education, agriculture—may be carrying on in his district must affect the life of his people. It is his duty to know the policy of the central Government which these departments are carrying out, to assist in its local application by explanations to the people, and to communicate restraining cautions, when such cautions are necessary. In his house and in his office all the directing local officers of these departments find common centres of approach.

Like the Governor in the metropolis, he is the social head of his district, when the district is sufficiently advanced to have a society. His presence is indispensable at all local gatherings and ceremonies. He can do much, if he will, by the judicious exercise of his influence to mitigate that mutual aloofness of race and creed which

chills and restricts the course of personal relationships in the Tropics, and which may be more easily countered in a small administrative station than in a central town. If he is married his wife may assist his work by visiting the girls' schools, interesting herself in the cases of women prisoners, befriending the nursing sisters at the hospital, and establishing personal relations with the ladies of the local communities.

HIS OFFICE APPEARS IN ALL PARTS OF THE EMPIRE

The District Officer under varying names and forms appears in almost all the regions of the Imperial and Colonial Services. His functions are of course most highly developed in India, where the District Officer, as principal officer of revenue, bears the uninspiring title of "Collector", and it is natural that in the countries which adjoin India, that is to say in Ceylon and Malaya, the office should exist in its most advanced form. But it has sprung up independently in the most distant quarters of the world, in Fiji and the Protectorates of the Pacific, in East, West and Central Africa, in Cyprus and Palestine, in British Honduras, and the Bahamas. Only in Jamaica (where his place is apparently filled by a system of parochial Boards), in Trinidad and British Guiana,[1] does the District Officer fail to appear where we might have expected him.

HIS EVOLUTION IN THE BAHAMAS

The story of his evolution in the scattered archipelago of the Bahamas may be of interest. On the abolition of slavery in the West Indies it was thought desirable to

[1] The introduction of this system of administration was recently suggested in British Guiana, but the proposal proved to be distasteful to the local legislature.

establish a system of Stipendiary Circuit Justices, who toured the West Indian islands and dealt with charges and complaints. But after a time in the Bahamas it occurred to one of the best of the Governors in the official succession, Governor Gregory, that at the principal islands under his sway the needs of the emancipated negro islanders would be better met not by a visit from Circuit Justices but by the appointment of Justices who should reside in their midst. "Resident Justices" were accordingly established in these islands. They gradually concentrated in themselves all the local functions of Government, and the office under its old name continued till 1907, when on a general re-organisation the title "Resident Justice" was replaced by that of "Commissioner". This was done under the hope, probably delusive, that it would lead to the promotion of these officers, who were all of local origin, to wider spheres.

THE DISTRICT OFFICER IN TROPICAL AFRICA

But the principal field for this class of officer is now Tropical Africa. Nothing could more strongly indicate the extent to which the centre of gravity of the Colonial Service has swung in this direction. In Ceylon (where these officers are styled "Government Agent" and "Assistant Government Agent") they number 19. In Nigeria they are 334; in the Gold Coast and its connected territories, 89; in Sierra Leone, 31; in Uganda (including cadets in training), 74; in Kenya, 98; in Tanganyika, 89; in Nyasaland, 39, or a total of 754. One is not surprised to learn from the *Colonial Office List* that these African appointments "form the bulk of appointments in the Colonial Service for which the Secretary of State selects candidates for general administrative purposes".

In Ceylon, Hong Kong, the Straits Settlements and the Federated Malay States the persons who, as members of the local Civil Service,[1] will ultimately fill these appointments, are selected after a competitive examination—the same as that at which candidates for the Indian and Civil Services qualify. In the case of the East and West African appointments the selection is made by a special Private Secretary of the Secretary of State on the basis of the record and personal qualifications of the candidates. The successful candidates before taking up their appointments have to undergo a course of instruction in tropical hygiene, accounting, criminal law and procedure, tropical economic products; surveying; international law; Mohammedan law and ethnology, and African languages; and with this preparation the young men selected embark upon a career, which deserves to be ranked among the most honourable careers in the world.

TRIBUTES TO HIS QUALITIES

Testimonials to the qualities of the District Officer will be found in all books written by men of pro-consular experience. Here is one from Lord Lugard—the most distinguished of our modern Colonial Governors.[2]

> The District Officer comes of a class which has made and maintained the British Empire. . . . His assets are usually a public school and probably a university education, neither of which have hitherto furnished him with an appreciable amount of positive knowledge especially adapted for his work. But they have produced an English gentleman with an almost passionate

[1] This service corresponds in dignity and importance with the Indian Civil Service.

[2] *The Dual Mandate in British Tropical Africa*, ch. VI, pp. 131–3. The whole passage on the subject of the District Officer, 131–6, deserves reference.

conception of fair play, of protection of the weak, and of "playing the game". They have taught him personal initiative and resource, and how to command and obey....

The duties which a District Officer is called upon to perform are very varied. In an isolated station he may have to discharge the functions of all the departments—postal, customs, police and engineering—in addition to his normal work. He is the medium of communication between the military or departmental officer and the native chiefs in matters of labour and supplies, and is specially charged to see that labourers are fully paid and properly treated. To him alike the missionary, the trader and the miner look for assistance and advice. The leper and the slave find in him a protector. As in India, he combines judicial with executive powers....He is also charged with the constant supervision of the native courts....He enforces the ordinances, issues licenses, keeps up the prescribed records, and renders the prescribed reports....

His duties as assessment officer of the direct (income) tax effect much more than the mere collection of revenue. He is brought into close touch with the people and gains an intimate knowledge of them, and of the personality and character of the chiefs and elders in every village. During his visit to each town he administers justice, enquires into and settles disputes, collects valuable statistics of population, agriculture and industries. He uses every effort to detect oppression and extortion, if it exists, and impresses on the village elders the allegiance they owe to their chiefs, and through them to the Government, the obligation to cease from lawless acts, and the right of every individual to appeal against injustice.

Another distinguished pro-consul, Sir Frank Swettenham, writing about pioneering days in a different and distant part of the world, describes the work of the District Officer on almost identical lines.[1]

[1] *British Malaya*, p. 242. A similar description of the duties of the District Officer may be found in the unimpassioned pages of the *Colonial Office List*. See "Information as to Colonial Appointments", Part III, para. 4. A similar account of the District Officer is given in the *Report on the Mandated Territories of Tanganyika for* 1923, Colonial, 1924, ch. II, pp. 5–6. See also, Sir George Fiddes, *op. cit.* pp. 142–3.

For the first 20 years of the residential *régime* when that system which may now be taken as established was being worked out by personal endeavour under the eye, the hand and the authority of the Resident, with only common sense and his own intelligence to guide him, his main supports were the officers in charge of districts, originally styled District Magistrates. Just as when the Resident was alone he had to do everything himself, so they, being alone, were in their districts, the Magistrate, the Chief of Police, the Public Works, and Survey and Land Officer, the Treasurer, the Coroner, the Superintendent of the prison (if there were one), the Inspector of Mines in a mining district, or the Harbour Master in a coast district. The magistrate had to travel all over his district, to learn its capabilities, encourage people to take up land and build houses, know everyone and be pleasant to good citizens, with at least one eye on the naughtily inclined. He was liable to be called upon at any moment of the day or night to go anywhere and do anything. The curious thing is that the men who held these posts, though they had passed no comprehensive examination, and had no special training for the work, somehow managed to do what was required of them, and in most cases did it extremely well.

Here is a testimonial to the District Officer in the Sudan—taken from an article in *The Times*:

The District Commissioner is part-time soldier, part-time magistrate, part-time tax collector, part-time builder of roads, part-time game warden, and generally all these things—and many more—at once. Away to the south-east of Rejaf there is a District Commissioner out on the sunbaked roads watching the progress of the bridges that are doing their essential share in linking up the Sudan with Uganda, and even farther south. Is there not a signboard at Mongalla that points down a road with the legend "To Nairobi" in large black letters? At Bor a patrol of the police, or the *Orta Khat el Istiwa* (the smart Equatorial Corps of the reorganised Sudan Defence Force), is mounting guard round a hut where another District Commissioner is patiently interrogating four prisoners held for the cold-blooded murder of a fellow-tribesman and trying to unravel the secrets of unrelenting blood feuds.

We have, of course, nothing corresponding to the District Officer in our English system of local administration.

If an enquirer from abroad came to this country and for the purpose of his studies sought for the Government officer presiding over local administration in an English county, he would not find him. Neither the Chairman of the County Council, nor the Clerk to the County Council, nor the Mayors, or Chairmen of the various Boroughs and District Councils in the area would correspond to what he was looking for. But Continental nations know the District Officer well. He is the *Préfet* who, in all countries where administration is based on the French model, presides over the local administration, as an officer of the Ministry of the Interior, appointed by and receiving his directions from the Minister at the Capital.

In some districts under advanced Governments the District Officer no doubt lives amid surroundings of dignity, comfort and beauty. He makes many of his journeys by motor-car, and his work is alleviated by telegraphs, telephones, rest houses, electric fans, ice and cold storage. But these things are exceptions. The District Officer in the Sierra Leone Protectorate—to take an example at the other end of the scale—is told in the Official Handbook (p. 216) that "a very large proportion of his time will be spent in travelling". He is warned to provide himself with mosquito nets, waterproof sheets, pump filters, water-bottles capable of holding enough for a day's drinking, hurricane lanterns and other articles of camp equipment. He must have thick stockings and strong boots for trekking and is warned not to get his feet or ankles into contact with mud or stagnant water, as these things are haunts of ankylostomiasis and bilharzia. He is advised to arm himself with a stock of medicines. He is given elementary hints as to malaria, yellow fever, dysentery, blackwater fever and sleeping sickness, and is instructed how to deal with the jigger, which bores a hole into his

foot, and the tumbo fly which "can cause a powerful boil by depositing a maggot under the skin".

For the discharge of his duties the District Officer depends partly on his office staff and partly on his district and village headmen. It is by the means of these latter that he must receive his reports, issue his orders and hold his enquiries. The "enquiry", sometimes held by the District Officer himself, sometimes by his subordinates, is a frequent and familiar instrument of district government. Another support, hard to dispense with, is the interpreter, but it is only when he can succeed in doing so that the District Officer on tour is his own master.[1]

DIRECT GOVERNMENT

There is one essential thing which until recent years was characteristic of the whole of this administrative system and is still the general rule. The District Officer rules his district directly. All these chief headmen, district headmen, village headmen, interpreters, are his subordinates, taking their orders from him. The decisions given upon their reports and enquiries are his decisions, for which he alone is responsible. They have no jurisdiction save what is delegated to them by him. This is so even in Ceylon, where the appointments of the various forms of chief headmen are given to persons of the highest local family standing, who in certain regions have the ancestral status and local customary dignity of "Chiefs". It is true that they exercise certain statutory powers as Chairmen of "Village Committees"—but they hold this position not by virtue of any constitutional or ancestral right, but as Government officers, just as the District Officer himself presides over local bodies of higher rank. The same principle governs district administration in British India,

[1] See Lord Lugard, *op. cit.* p. 138.

where the Tahsildars and Talukdars, though personages of importance, are, like their subordinate headmen, simply members of the administrative hierarchy under the direct orders of the District Officer.

II. INDIRECT RULE

Since the commencement of the present century, however, there has developed in various parts of the Empire a new system, of the highest possible interest, known by the name of "indirect rule". It is indeed far the most significant movement now proceeding in our Colonial Empire and merits the careful attention of the political student. The region where it has been most fully applied and the source from which it has spread is Northern Nigeria, and its chief originator and apostle has been Lord Lugard.[1]

This system of Government has three aspects:

(1) Administrative.
(2) Judicial.
(3) Legislative.

The present chapter will only concern itself with the administrative aspect. The others will be considered in their due place, but it is well that it should be realised that they are all aspects of the same principle.

NATURE OF INDIRECT RULE

Under this system the British administrator endeavours to govern the people committed to his charge not directly but through the medium of their own tribal or other local authorities. If any native authority exists in full vigour, it is jealously preserved. If any old native authority is

[1] See in particular *The Dual Mandate in Tropical Africa*, chs. x, xi and xxvii.

in a state of decay, an effort is made to revive and re-invigorate it. If all local native authority has become disintegrated, the administrator seeks to reconstitute it by a grouping of units, and gradually to entrust it with such minor functions as it is able to discharge. This does not mean that there is an abdication of the direct work of Government. The great machine of Government still proceeds in all its departments, both administrative and technical, but, within the framework of this Government, every effort is made to train the native authority in executive responsibilities and in sound principles of Government and progressively to extend its sphere.

INDIRECT RULE IN NORTHERN NIGERIA

Let us then consider the system at work in Northern Nigeria. Here the "native chiefs", the Mohammedan Emirs, have the status of hereditary princes. The Emirate of Kano in 1920 had a population estimated at some 2,000,000, that of Sokoto a population of over 1,250,000. Other Emirates are smaller but still considerable. In every district of his territory the Emir has a principal executive officer, the District Headman, who is a territorial magnate with local connections, and under him the village headmen are grouped. For the purpose of Government control the native authorities, which vary greatly in their power and extent, are comprised in provinces. Over each province there is appointed a Resident. Just as the Emir in every district has a District Headman, so the Resident for every district of his province has a District Officer—who is technically known as a "Political Officer". These titles, derived from India, have been studiously chosen so as to express the principles of the new system of Government. They politely suggest that the Chief Officer of the Province

is really only residing in a native jurisdiction, or group of jurisdictions, and that the District Officer is not dealing with a subject race, but with recognised communities under British Protection.

The position of the Nigerian Resident may best be understood if it is compared with that of a Resident in one of the "Native States" of India. The Indian Resident is accredited to the court of the Raja, watches the general course of his Government, tenders to him general advice, reports to the Viceroy's Government on the condition of the State, and is the medium for any communication the Viceroy's Government may think it necessary to make, but he does not in any way direct or control the general administrative processes of the Raja's Government. The position of the Nigerian Resident is wholly different. He is not accredited to a protected Sovereign: he is an officer of the governing Power. His subordinates are on tour[1] in every district of his province, watching, advising and reporting upon the subordinates of the Emir, while, as has been already explained, the great fabric of British Government, both technical and administrative, stretches throughout the whole territorial area subject to the Emir.

The position as it was in its early stages is well explained by Sir Charles Orr, once "of the political department, Northern Nigeria", and now Governor of the Bahamas. Having pointed out that hitherto alien conquerors have either administered the conquered country or left it to be

[1] Political officers are not permanently stationed at any place in an Emirate except the Emir's headquarters. It has been found that the establishment of a permanent out-station in an Emirate results in the setting up of a focus of authority, which must clash with and weaken the control and authority of the Emir.

governed by its ruler subject to a general supervision, he continues:[1]

> In Northern Nigeria it seems to me an entirely new experiment is being tried. British and native officials rule side by side. The attempt is made to leave the native rulers to carry on their own Government, but the Resident does far more than advise. He has power to arrest, try and sentence natives in his own Court without referring in any way to the native rulers. With regard to taxation he conveys precise orders from the Governor as to the amounts to be collected, mode of assessment and collecting and so on; visits and assesses farms and villages in person; investigates complaints as to over-assessment or extortion, and generally carries out a direct interference in all the internal affairs of the State.

Thus, in so far as direct administration is retained in his own hands, the functions of the Resident are those of a Ruler; in so far as administration is delegated to the native authority his functions are those of advice and tutelage. In exercising these functions his aim will be gradually to reduce the extent of his own interference. He will consult to the fullest extent the dignity of the local chief. All customary ceremonies and observances will be studiously carried out. The measure of his success will be partly the extent to which he is able to extend the scope and elevate the character of the native administration, and partly the respect and regard with which the populace hold their own chiefs and elders.

As it has been put by Mr C. L. Temple, late Lieutenant Governor of Northern Nigeria:

> The Resident must be a living force, regarded with confidence by the people as their protector in the last resort, and with

[1] *The Making of Northern Nigeria*, p. 277. See also for a very full account of the duties of a Resident in the early days of the Protectorate, pp. 137–9. The process of devolution of authority has been greatly extended since Sir Charles Orr left Nigeria.

respect by the Emir and his Chiefs, who must feel that they cannot throw dust in his eyes, but that at the same time they can rely on him to support them in the exercise of their legitimate authority.[1]

THREE ESSENTIALS TO INDIRECT RULE

(1) A Paramount Chief

In order that a "Native Authority" may be effectively established, three things are essential. First, there must be a Paramount Chief, succeeding by hereditary right, and commanding the allegiance of the smaller chiefs dependent upon him. If the authority of the Paramount Chief is disintegrated, there is no firm foundation to build upon. In the more primitive regions this is largely the case. All the Government can do in such circumstances, in order to carry out its policy of indirect rule, is to seek "to group together small tribes or sections of a tribe, to form a single administrative unit, whose chiefs form a 'Native Court', with defined powers and through whom the District Officer can work."[2] This has been done in several places with considerable success. But the powers that can be entrusted to such artificial creations are necessarily much less than those committed to an old-established Emirate.

(2) A Native Treasury

Secondly, there must be a Native Treasury. It is essential that the inhabitants should pay their taxes to the "Native Authority", that this Authority should be allowed to retain a fixed proportion (generally 50 per cent.) of the proceeds of direct taxation[3] for its own local purposes, and that the

[1] *Native Races and their Rulers*, p. 67.

[2] Lord Lugard, *op. cit.* p. 217.

[3] The Native Administration takes the whole of the Native Court fees and fines—a considerable sum. Since April, 1928, the share of direct taxation allotted to fully organised native administrations has been 70 per cent.

remainder should be transmitted to the Central Government through the Resident. The fixed taxes so collected take the place of all the old irregular extortions exacted by the chief. The proportion allotted to the Native Treasury becomes a fund for native purposes. Out of these the Emir and all his subordinate officers are paid regular salaries (the Emir of Kano receives a salary of £5000 a year), and all the local institutions and wants are supplied.[1] Naturally there can be no treasuries without taxation. The policy of the Nigerian Government is to extend the sphere of indirect rule. For this purpose the first step must be the imposition of a tax. But, as Burke observed, to tax and to please, any more than to love and to be wise, is not given to man. Some months ago there appeared a paragraph in *The Times* announcing that at a certain place in Southern Nigeria the police had found it necessary to fire upon the people, who were demonstrating against the imposition of direct taxation. The explanation was not that the Government was making an injudicious attempt to increase the revenue but that it was seeking to prepare the way for the introduction of indirect rule in a new sphere. The Native Treasury is now recognised as the foundation of the system.[2]

[1] In Tanganyika it has been found possible at certain centres to create confederated treasuries—a group of local authorities agreeing to pool their resources.

[2] See *Report of Mr Ormsby Gore on his visit to West Africa*, 1921, Cmd. 2744, p. 115: "I cannot overestimate the importance of the part played by the existence of native Treasuries with clearly defined sources of revenue. Without such Treasuries the Chieftainship cannot be adequately maintained, and in the absence of such Treasuries the tendency to irregular methods of obtaining money on the part of the native chiefs would be encouraged. I regard the allocation of part of the proceeds of Taxation to the native Treasuries as the most essential feature of the system".

(3) Native Courts

The third essential for the existence of an effective "Native Authority" is the establishment of Native Courts. It is necessary that the Paramount Chief should be able to assert and enforce his authority in his own country, and the powers of these Courts should be of such a nature as to support his dignity in the eyes of his people. So far is this principle accepted that to some of these Courts is accorded the power of life and death. But the question of these Courts will be further referred to in their appropriate place.

LEGISLATIVE MACHINERY

We are now in a position to consider the manner in which this novel system is worked. For the purpose of investing the various "Native Authorities" with the required legal powers, an Ordinance is necessary. In Nigeria this is No. 73 of 1916, which has been closely followed in Tanganyika (No. 18 of 1926). Under this Ordinance the Governor is authorised by notice in the *Gazette* to establish Native Authorities and to define and limit their powers according to the circumstances. Elasticity is the note of the whole system. In practice the native administrations of Nigeria are classified as (*a*) fully organised, (*b*) partially organised, (*c*) unorganised. The Resident watches their working, and either by direction or under general delegation of the Governor enlarges or restricts their several powers as development appears to warrant. Under the same Ordinance, obligations are imposed upon the people to obey these Native Authorities and to attend before them when summoned. There is a long enumeration of the classes of orders which a Native Authority may issue, and these may from time to time be enlarged by notice in the *Gazette*. These orders are promulgated in the customary manner and have the force of

law. At the same time power is reserved for the control and direction, where necessary, of the Native Authority by the Resident, who is authorised to require the issue of proper orders or the revocation of those deemed to be improper. Native Authorities are themselves liable to penalties if they fail to discharge their duties. On the other hand, to conspire against them or to attempt to undermine their lawful authority is a punishable offence. Finally—what is most important—subject to the approval of the Government, Native Authorities are empowered to make rules "for the peace, good order and welfare" of their people and these rules when promulgated have the force of law.

ADMINISTRATIVE MACHINERY

The system thus established is worked not in any strict bureaucratic manner but by friendly conferences. The Resident and the Emir or Paramount Chief meet in conference two or three times a week, and the local District Officer may, if required, himself attend this conference. The Resident and the Emir on such occasions are armed with reports from their own District Officers and the necessary advice, directions, or assistance can be given and the line of action settled.

It should be noted that the District Officer does not issue orders to the village headmen himself. He applies to the District Headman, or if the matter is of importance, he has it brought before the Paramount Chief by means of representation to the Resident.[1] As Lord Lugard says in

[1] See Lord Lugard, *op. cit.* p. 225. Lord Lugard also quotes Lord Milner's account of the relations between the British Governor and the local Mudirs in Egypt. "Tell us what you want done", they say to the foreign monitors, "and we will take care that your wishes are carried out, but do not attempt to see to their execution yourself." This is the whole difference, he observes, between direct rule and rule through native rulers.

his *Report on the amalgamation of Northern and Southern Nigeria* (1920) in para. 24:

> A Political Officer would consider it as irregular to issue direct orders to an individual native, or even to a village head, as a General commanding a division would to a private soldier, except through his commanding officer.

The degree to which this policy has been carried on in Northern Nigeria is very remarkable. Sir George Fiddes, writing in 1926, states that at that date there were sixty-one such administrations, preparing estimates of revenue and expenditure on the Colonial model. They receive for themselves 50 per cent. of the revenue they collect.[1] Their total revenues exceed £900,000 and their surplus funds amount to more than £1,200,000. The revenue of Kano is £118,000. In addition to the Emir, with £5000 a year, there are numerous well-paid officers, and several departments—Judicial, Treasury, Police, Prisons, Public Health, Medical and Sanitary, Agriculture, etc. This Emirate has an Arts and Crafts School of a remarkable character.[2]

Advanced Native Authorities elsewhere are learning to make roads, and to maintain hospitals, schools and prisons, and officers of the technical departments are from time to time seconded to assist them.

On the other hand, we must bear in mind the extraordinary variability of the conditions under which the system is applied. Some Authorities have old and elaborate organisations. Others are primitive in the extreme. To these the control applied differs little from direct rule and in some areas direct rule must be retained. The Governor of the Mandated Territory of Tanganyika, in his *Report* for the year 1922, pp. 5–6, speaks of the varied character of

[1] In special cases this proportion had been raised to 75 per cent. See now footnote 3 on p. 74.

[2] *The Dominions and Colonial Offices*, p. 149.

the local chiefs. Many of them are too young to abdicate, but too old to progress. They spend their time in beer drinking, bhang smoking, and hunting, and have no conception of their responsibilities. On the other hand, he says, many tribes possess a well-developed capacity for administration and their Sultans are energetic and progressive rulers.

Wide as are the powers committed to the more advanced of the Native Authorities, it must not be forgotten how wide also are the powers which the Central Government reserves to itself—the power to raise armed forces, or to permit the carriage of arms; the right to impose taxes, the right to legislate (except in the form of approved regulations), the right to acquire lands for public purposes or commercial requirements, and finally the right to confirm and depose chiefs.

Nor must we fail to remember that, large as is the field filled by the Native Administrations in Nigeria, the Nigerian Government is one of the most fully developed in the Colonial Service. A glance at the chapter relating to it in the *Colonial Office List* discloses a fully organised and manned administration of the highest order, which discharges its manifold functions all through the territories of the Native Administrations, helping them where its services are required and in no way superseded by them.

It would be well perhaps to let Lord Lugard himself expound the objects of the system he has done so much to establish. I quote the following from an address on "Problems of Equatorial Africa" delivered to the Royal Institute of International Affairs on January 21, 1927.

> When an African community has organised itself under a chief, the object in view will be to create in him (and his council of elders) a sense of responsibility towards the people over whom he rules on the one hand, and towards the government of which

he forms an integral part with definite duties on the other. To this end he is entrusted with increasing financial and judicial powers. He is assigned a portion of the tax which is levied in his name and through his agency, and he learns that he can no longer appropriate to his own use the proceeds of such extortionate levies and forced contributions as he was formerly wont to impose upon the people, for the maintenance of idle display and a large harem. He learns that the funds entrusted to him are public revenue from which a specified sum is assigned for his personal expenditure, and the remainder must be properly accounted for—whether expended on the salaries of his executive officers, or on public works for the improvement of the country. In the judicial sphere native courts are set up and he is charged with their general supervision. In the administrative sphere he learns the necessity of delegating responsible duties to headmen of districts. He learns to take a new pride in the ordered development of his domain. Naturally the process of evolution is of slow growth. In the case of advanced tribes it may take many years. Among the primitive communities it may require generations, even though aided by schools for the sons of chiefs, in which the new principles are inculcated on receptive minds.

This experiment in Government is so interesting, and in some of its features has been the subject of so much local controversy, that it would be well that we should devote some attention to the grounds on which it has been advocated and assailed.

JUSTIFICATIONS AND CRITICISMS

Lord Lugard has confidently and emphatically justified it, not only in his well-known book but in a succession of public deliverances. Mr Temple, who served as one of his lieutenants, was its unqualified and insistent advocate. But its most effective and enthusiastic exponent, after Lord Lugard, is Sir Donald Cameron, the Governor of the Mandated Territory of Tanganyika. On his arrival in the Territory in April, 1925, he set himself to organise it there.

In July of the same year he addressed a full and emphatic memorandum on the subject to all his administrative officers. Later he addressed a speech on the same subject to his Legislative Council at its first meeting and also wrote a preface to a pamphlet published for circulation to the general public. This zeal of Sir Donald Cameron is understood, when it is realised that he served for sixteen years in Nigeria and was for three years Chief Secretary to Government. Equally enthusiastic are the officers appointed to administer the Mandated Territory of the British Cameroons, now attached to Nigeria.

In the first place it is urged that at the outset when Northern Nigeria was taken over from the Chartered Company in 1900 no other policy was practicable.

"The policy of ruling indirectly through existing chiefs", says Sir Charles Orr, "was at once adopted. Indeed no other policy was at the outset possible, nor, had it been possible, would there have been any justice in sweeping away the Chiefs and Rulers, and setting up an alien rule in their place. A European staff, large enough to administer the country and collect all the taxes, would have been so costly as to be out of the question, nor, with the country unmapped, unexplored and practically unknown would such a staff have had (were they disposed) sufficient knowledge to enable them to do so."[1]

Sir Donald Cameron declares that direct rule is impossible in Tanganyika to-day. "It is quite impossible", he says, "for us to administer the country directly through British officers, even if we quadrupled the number we now employ."[2]

In the second place it is contended that a District Officer who endeavours to govern directly is setting himself an impossible task. He cannot learn all the languages

[1] Orr, *The Making of Northern Nigeria*, p. 220.
[2] Colonial, No. 18, 1926, p. 8.

in his area. He is in the hands of his interpreters and his police. They are the real Governors—and practise nefarious tricks in his name.[1]

Thirdly, it is urged both by Mr Temple and by Sir Donald Cameron that indirect rule provides the only possible way of exercising influence upon the local population. "I can exhort the people through their chiefs", says Sir Donald Cameron, "it would be impossible for us to exert the same influence on a community of mere individuals."

In the fourth place great importance is attached to the educative effect of indirect rule.

> "Direct British rule among primitive tribes", says Lord Lugard, "may perhaps...be...temporarily at any rate the more efficient—albeit the most costly—method. *But it shirks the more difficult task of education*, and when the time comes—as it certainly will come—and the people demand a voice in the control of their own affairs, we shall find, as we find in India to-day—that we have sapped the foundations of native rule, and have taught them only the duty of obedience."[2]

"We have to make the native a good African," says Sir Donald Cameron. "We should not achieve this by destroying his institutions and traditions and superimposing our alien system."[3]

Fifthly, it has the advantage of immediately giving to the local population a share in the Government in a form

[1] It must be confessed that this is not very convincing. Some districts have to be governed by direct rule for want of an effective Native Authority. It is presumed that the Government of these districts is not wholly inefficient. Further, if there are difficulties in controlling subordinates under a system of direct rule, must not the effective watching of the officers of Native Administrations present corresponding difficulties?

[2] Lord Lugard, *op. cit.* p. 219.

[3] Sir Donald Cameron, *Report on Tanganyika for* 1925, p. 7.

which they can understand and appreciate, and at the same time of creating a bulwark against subversive political agitation.[1]

Finally, great stress is placed upon the evil effects of "detribalisation". Detribalisation in Africa means demoralisation and it is maintained that indirect rule and a revival of tribal authority provide the only means of checking what is described as the "dry rot" which is everywhere setting in.[2] In his domestic relations as well as in his personal character, the detribalised African is said to be doomed to degeneration. The people under these conditions become "disintegrated into an undisciplined rabble of leaderless and ignorant individuals", little better than imported coolies. Maintenance of the tribal authority, on the other hand, preserves their self-respect and is in accordance with their inner convictions and preferences.[3] Such are

[1] "If we preserve the tribal authority, gradually purging native law and customs of all that offends against justice and morality, building up a system of the administration of the affairs of the tribe by its hereditary rulers, with their advisers according to native custom, we immediately give the natives a share in the Government of the Country, and that moreover on lines that they themselves understand and can appreciate.

"The position given to the Chiefs in this way will be jealously guarded by them and their people, especially against the assaults which may in the course of time be made against it by Europeanised natives seeking to obtain political control of the country and so govern it entirely on European lines. We are not only giving the natives a share in the administration of the country, but we are at the same time building up a bulwark against political agitation"—Sir Donald Cameron, *Report on Tanganyika for* 1926, p. 8.

[2] See in particular Temple, *op. cit.* p. 73.

[3] See Resident of British Cameroons in *Report for* 1924 *to League of Nations*: "All races prefer local self-rule, relatively inefficient though it may be, to direct alien rule however just and beneficent".

the principal arguments by which "indirect rule" is supported.

On the other hand, the system has been the subject of very pronounced criticism from various quarters. It is contended that it is disfigured by tyranny, venality and other abuses. Mr Temple meets this by painting a picture of these abuses in far higher colours than those used by any critic of the system, admitting that they exist, but maintaining that they are features of a necessary stage of evolution and that people must in the meantime shut their eyes to them.[1] Moreover he points out, not with a very convincing effect, that similar abuses existed in England in the days of Queen Elizabeth. It is a more satisfactory reply to these criticisms that those who are responsible for maintaining the system of indirect rule are fully alive to the dangers of these abuses and vigilant to cope with them.[2] The fact that such experienced Governors as Lord Lugard, Sir Hugh Clifford, Sir Donald Cameron and Sir Graeme Thomson, who must be fully acquainted with the

[1] "To put this policy into real effect means first of all that you must shut your eyes up to a certain point to a great many practices, which though not absolutely repugnant to humanity, are nevertheless reprehensible to our ideas.... It is still more difficult for people at home to shut their eyes but they must." See *op. cit.* pp. 29–30 and p. 68.

[2] Lord Lugard, in a recently published advance extract from his promised text-book edition of the *Dual Mandate*, emphasises the necessity of continued supervision. He quotes a report to the Governor of May, 1920, by the Resident of Kano (a model Emirate), where, as elsewhere, supervision had been relaxed during the war. The native administration had depreciated from what it was twelve years before: "The rapidity of the descent has been remarkable. In Kano the bribery and corruption are almost naked and quite unashamed. Village headships are being bought and sold. Taxes are being embezzled, and district heads and satellites are having the time of their recent lives".

difficulties and dangers of the system, all confidently uphold it, is a circumstance which is qualified to quiet the apprehension which the attacks on the system excite.[1]

Further, as was inevitable, the system finds strong opponents among those of the local community who have been educated on European lines, and have attained success in the legal profession.[2] This is natural, as the system opposes ancestral and aristocratic institutions, indigenous to the soil, to the "career open to the talents" under conditions imported from abroad, and it may be accepted that this antagonism will become more and more pronounced.

There are yet other critics, who regard the system as retarding the development of the native population, and holding them down in a feudal condition. This is the view adopted, perhaps without a very full examination of the subject, by Major Church, one of the East African Commissioners of 1925.[3] Critics of this school put forward as an alternative to the theory of indirect Government, for the purposes of East Africa at any rate, what is known as the "contact theory", i.e. the theory that the native races must look for their future development to the stimulus to be obtained from contact with the white settler. The arguments for and against this "contact theory" may be found in the majority and minority reports of the East African Commission of 1925.[4] The advocates of this theory

[1] See Lord Lugard, *op. cit.* p. 224.

[2] See Lord Lugard, *op. cit.* p. 223: "The educated native very naturally dislikes it, for it places the native chief, who has no schoolroom education, and is probably ignorant even of the English language, in a position of authority over his people and tends to make him independent of the educated native lawyer or adviser".

[3] *East Africa. A New Dominion* (1927), p. 117.

[4] Cmd. 2387, 1925, pp. 38–41, and pp. 186–7.

hold that the necessary "contact" may most appropriately be obtained by the employment of native labour on European estates. This point of view is sometimes too readily brushed aside. Among the settlers are many men with whom contact would prove a powerful means of education. But such influences are only available on a small scale. Among the pronounced opponents of this theory is Sir Donald Cameron, Governor of Tanganyika,[1] who incidently points out that indirect rule has proved quite consistent with the employment of native labour on large plantations in the Cameroons, and on tin mines in Northern Nigeria.

There can surely be no question, when these contending considerations are weighed, in which direction the balance of our judgment should incline. The Paramount Chief, assisted by his Council of advisers, and controlled by custom, is an indigenous African institution. It is one which the people understand, and it cannot be replaced by an artificial imported alternative. It is in the development of this institution that the path of progress lies. Nor can we fail to believe that with the improvement of education there will be a great development in the character and ability of the African Chiefs. Such institutions as the school for sons of Chiefs at Tabora in Tanganyika and the College which the Gold Coast Government is establishing at Achchimota have a very powerful effect. At such schools boys can be trained up in the traditions of public spirit and in high ideals of energetic personal character, and when

[1] See *Report on Tanganyika for* 1925 (Colonial, No. 18), p. 8: "The gap is, I fear, not going to be bridged by a few years contact with the European on a plantation, a gap, which destroys the tribal instinct, and produces, if left to itself, something very much akin to the products of the slave system, which might have been found in the West Indies a century ago".

they succeed to the authority they are destined to exercise, their school training will affect the whole spirit of their administration.

The territorial area within which indirect rule has been established or revived may now be considered. Let us in the first place take Tropical Africa.

INDIRECT RULE IN SOUTHERN NIGERIA AND THE CAMEROONS

The theory and practice of indirect rule were first fully worked out in Northern Nigeria. Since the amalgamation of 1914 it has been extended to Southern Nigeria and has been established in five provinces, all in South-western Nigeria, with great success.

> In these provinces are to be found highly organised States ruled by Paramount Chiefs with various titles, drawing their revenues from direct taxation and administering their own finances under the guidance of the Resident.[1]

Four of these provinces have a population of over a million each, and one of the ruling Chiefs, the Alafin of Oyo, is the fortieth of his line. It has also been extended to the Mandated Territory of the British Cameroons, now attached to Nigeria. The Resident reports on it in a spirit of enthusiastic idealism, contrasting the material things with which direct rule is concerned with the high vocation of the indirect administrator.[2] These Cameroons Reports well deserve fuller reference.

[1] *Report of Mr Ormsby Gore on his visit to West Africa*, 1926, Cmd. 2744.

[2] *Report* for 1924, pp. 48 sqq. See also *Report* for 1925 (Colonial, No. 22), p. 4.

THE GOLD COAST

The policy is the official policy of the Gold Coast Government,[1] but Mr Ormsby Gore on his visit in 1926 noted that it had not hitherto been found possible to introduce that cardinal feature of the system—the independent Native Treasury. He refers to difficulties that have prevented its establishment, but emphasises the desirability of their being overcome. One is conscious, however, that here we are in another atmosphere. In the Reports on the Mandated Territory of Togoland, which is attached to the Gold Coast, the references to the system are formal and unilluminating. One misses the pure ardour of the Nigerian gospel. In 1927, a very comprehensive Native Administration Ordinance was passed, which, like most Crown Colony legislation, followed a line of its own. It establishes an elaborate organisation of Paramount Chiefs with State Councils and punishes as an offence "wilfully refusing to render to a paramount chief, or minor chief such homage, service and due as are sanctioned by native customary law and are not repugnant to justice, equity and good conscience".

One gathers the impression that in the Gold Coast great respect is paid to tribal organisations and traditions, and that this spirit pervades the whole administration, but one is not conscious of that active, stimulating and reforming pressure by the Government which is so marked a feature of the system in Nigeria.

[1] See speech of Mr Amery in *The Times*, January 16, 1927, and Mr Ormsby Gore, Cmd. 2744, p. 135. "The policy of Government is...to rule as far as possible through the tribal organisations and not to allow them to be undermined and overthrown by the destructive influences caused by an alien civilisation."

SIERRA LEONE

The Sierra Leone Protectorate has legislation on the subject, which authorises assemblies of Paramount Chiefs to advise the Governor and to pass laws, subject to the approval of the Governor, "for the welfare of the race and territory represented by the Chiefs constituting such assembly"—but Mr Ormsby Gore says in his Report above quoted (p. 154):

> Administration is of the direct type, for although there are numerous chieftains, there is nothing in the nature of Native Administration, although each Chief has his Court wherein he settles disputes arising among natives.

EAST AFRICA: UGANDA, TANGANYIKA, KENYA

In East Africa the position is much weaker. It is only in Uganda that old-established indirect rule exists, under conditions of dignity.[1] Even in Uganda there are very great local variations in the degree to which indirect rule is found practicable. Uganda embraces, besides other territory, a group of princedoms. Chief among them is that of Buganda. Its chief, the Kabaka, is recognised as having the status of King, is addressed as "His Highness", is a K.C.M.G., and himself with the royal approval has instituted an Order of Honour called the Order of the Shield and Spear. Indirect rule in this principality is very fully developed in all its aspects—administrative, judicial and legislative, and the position and rights of the Kabaka are regulated by treaty.

[1] Cf. Sir George Fiddes: *The Dominions and Colonial Office*, p. 116: "In other parts the old tribal authority is inevitably decaying, but as it declines it is replaced by that of the Government, as represented by the District Commissioner. The change is not stimulated by Government policy, and it comes about too gradually to cause sensible disturbance".

Its most impressive institution is the Lukiko, of which in its legislative aspect a special correspondent of *The Times* has recently given the following picturesque account:

> This morning the Kabaka opened the full session of the Lukiko, looking down on nearly 200 white-robed members from the throne, placed on a magnificent rug composed of about a dozen leopard skins, and surmounted by the skin of a black-maned lion, while outside in the sun-baked courtyard the royal drummers beat a tattoo, the sound of which carried across the seven green hills on which Kampala is built.

Speaking of East Africa generally the Commission of 1925 reported as follows:

> Since the European occupation there has everywhere been a decline in the power and authority of the chiefs. Throughout Northern Rhodesia, Nyasaland, the greater part of Tanganyika Territory, and Kenya, the collection of direct tax from the natives is undertaken by British officers.... Only in Uganda, in a few parts of Tanganyika Territory and in Barotseland does any fixed proportion of the taxes so collected go to the chiefs or native Government.... Except in the case of the Keydas of Buganda, and the three principalities of Bunyoro, Toro and Ankole in the Uganda Protectorate and in Barotseland in Northern Rhodesia, there are no paramount chiefs left, such as existed in the old days.

In Tanganyika, however, things have since become more hopeful. Immediately on his arrival to take up the Government in April, 1925, Sir Donald Cameron set himself "to organise a system of native administration on sound principles", and in his report to the League of Nations[1] issued in 1927 he states:

> The system of indirect administration introduced in 1925... has been applied with satisfactory results through a great part of the territory. In other portions of the country investigations are still being pursued with a view to the formation of a native administration if possible, whilst in still other portions it has been definitely decided that the form of administration must be direct.

[1] Colonial No. 25, p. 7.

We may rest satisfied that in Tanganyika under Sir Donald Cameron the system will receive the full development of which it is capable.

In Kenya, where the situation is made most complicated by the presence of a large European settlement, tribal authority is weakest, and no systematic attempt to reconstitute it appears to have been considered practicable. The Native Authority Ordinance, 1912, merely authorises the Government to appoint headmen or Councils of Elders and gives them various powers on appointment. An amending Ordinance allows the Governor to establish local Native Councils, which under the chairmanship of the District Commissioner are only of an advisory character. They can impose rates and administer a fund. There is nothing whatever in the nature of "indirect Government" properly so called.[1]

THE MALAY STATES

Indirect rule is to be found in other parts of the Empire, but not everywhere where it might be expected. Thus in the Federated Malay States there are native rulers treated with great respect, and a system of Residents. But here, as we shall see in subsequent lectures, the development has been in the very reverse direction to that in which things have proceeded in Nigeria. The system originated in the example of the Indian Native States, but has wholly departed from its model. Instead of governing through the Rulers, the Residents have themselves assumed all executive power and initiative and govern the country directly, though in the name of the Rulers. On the other hand, in

[1] It is not to be inferred that a great deal has not been done in Kenya to promote the progress of the local Africans. The Government has devoted itself sedulously to the subject. See an interesting publication by the Kenya Government: *Memorandum on Native Progress*, 1927.

the Unfederated States, owing to local historical causes, the course of development has been otherwise. Here there is a system of indirect Government of a very interesting nature, not in the least like that established in Nigeria. It will receive subsequent consideration. Nothing could better illustrate the extraordinary elasticity of the Colonial Office system than these three experiments in administration.

THE PACIFIC

Another quarter of the Empire where indirect rule has been developed is the Pacific. The subject will be found discussed in an interesting book recently published, entitled *Population Problems of the Pacific* by Mr Stephen H. Roberts.

The necessity of "indirect rule" as a means of counteracting the corrupting effects of "detribalisation"—which in the Pacific were very serious indeed—appears to have presented itself simultaneously and independently to Lord Lugard in Nigeria and Sir William McGregor in Papua. The same policy at the same period was adopted by Germany in German New Guinea and German Samoa. The subject has received active attention since the war. In Mandated New Guinea, indeed, the growth of the authority of the native officials seems to have outstripped the law, which will no doubt shortly be extended to overtake the practice.

In a recent report of a conference between the officers of the New Guinea Administration and representatives of missions in the Territory, it was recommended:

> In order to leave native Government in the hands of the natives, native chiefs and councils should be recognised and given jurisdiction over all matters affecting natives including the punishing of all crimes except murder and poisoning.[1]

[1] *The Times*, November 4, 1927.

In the Gilbert and Ellice Group the native official is said to play a large part both in the maintenance of order and as liaison officer.[1] With few exceptions the hereditary chieftainships have ceased to exist, but each island has its own native Government, presided over by a native magistrate.

In Fiji on the other hand the development is said not to have been so satisfactory. Sir Hercules Robinson, the first provisional Governor in 1874, set up a system of indirect rule based upon the authority of chiefs, but this is said to be "crumbling". Movement has been in the direction of Provincial and District Councils—and authorities established in recent years have been legislative rather than administrative.

"The whole position", says the writer already quoted, "savours too much of an imposition of a policy from above instead of a development from below. Certainly there is not the power of the headman and the co-operation of the villagers which is found in other groups of the Pacific, and on the whole it cannot be said that indirect rule has been fully established in Fiji."[2]

Certainly the institutions thus indicated have none of the three essential features of indirect rule as established in Nigeria: first, the hereditary administrative authority of the Paramount Chief; secondly, the power to assert that authority through Native Courts, and thirdly, the independent Native Treasury.

In bringing to a close this very imperfect sketch of the principles of indirect rule, let me remind you that one of the essential features, and that a very important one—the Native Courts—remains to be discussed and will be dealt with in the appropriate chapter.

[1] Stephen H. Roberts, *Population Problems of the Pacific*, p. 164.

[2] *Ibid.* pp. 167–9.

CHAPTER V

THE ORGANISATION OF LAW AND JUSTICE

I. The Attorney General and his Various Capacities

(1) Minister of criminal justice. (2) The legal adviser of Government. (3) The representative of the Crown in suits against Government. (4) The official leader of the local Bar—private practice. (5) The draftsman of legislation — Consolidation — Codification — The local Statute Book — Statements of objects and reasons — Subordinate legislation. (6) The exponent of Bills in the legislature. (7) The reporter on laws to the Secretary of State. (8) Member of Executive Council. (9) *Pater patriae*—guardian of public rights.

II. The Police

Diversity of conditions—Investigation of murder cases—*Quis custodiet custodes?*—Police training—The Information Book—Exclusion of police evidence of confessions—The prisoner's statement—Restriction of police custody—Statements by prisoners accused of praedial larceny.

III. Prisons

Revolution in English standards of prison conditions—Colonial standards of efficiency—Prisons of native administrations—Prison reforms in Ceylon.

IV. Civil Execution

So far we have been dealing with the general administration and technical spheres of Government. We now approach a sphere which is indispensable to the general fabric of Government, and which from many points of view is the most important with which the Government has to concern itself—the organisation of law and justice. In the settled, crowded and multifarious life of our country this is a subject that does not occupy a large space in the mind of the ordinary citizen—but in countries at a more primitive stage of development it obtrudes itself much more largely on the public view, more particularly in those where the general system of Government is being built up from its foundations.

This is a subject which has two sides—the executive and the judicial.

On the judicial side, it is for the Courts to declare the law, to deliver their judgments, to impose their sentences, or, when duly invoked, to assert the rights of the public and the liberties of the subject. On the executive side, it is necessary to make provision for the setting in motion of the processes of law, for the enforcement of the orders of the Courts, and for the development and remoulding of the law to meet the changing and enlarging needs of the time.

Foremost among the officials, who under the Colonial Office system of Government are charged with the oversight of this order of subjects, is a conspicuous Officer of State—the Attorney General—whose powers and status must be a matter for special study. Next to the Attorney General come the Police, whose function it is to maintain order, to protect the public, to investigate crime, to initiate the minor and preliminary processes of law, and to aid in its enforcement. Further, there are the Prisons, by which the ordinary criminal judgments of the Courts are enforced, and, finally, there is the officer who corresponds to the sheriff in England, by whom are enforced the civil judgments of the Courts and such criminal judgments as involve a pecuniary penalty. Let us proceed then to devote a necessarily brief consideration to the working of this sphere of executive Government.

I. THE ATTORNEY GENERAL AND HIS VARIOUS CAPACITIES

The Attorney General was part of the original scheme of Government in those early American Colonies from which our whole Colonial system of administration has sprung. If one may compare small things with great, he

fills, proportionately speaking, a much larger space in the general scheme of Colonial Government than does the Attorney General in the Government of the Mother Country. In a Colonial Government he is an indispensable Cabinet Minister (if one may so describe an Executive Councillor). He is one of the mainstays of the Government and has a correspondingly high precedence, ranking next after the Colonial Secretary. He has from time to time appeared under various titles. In Cyprus, before the war, he was known as the "King's Advocate". He bore the same name in early days in Ceylon—no doubt by infection from India—where the "Attorney General" is unknown. In Palestine he was at first styled "Legal Secretary". In the Federated Malay States, in pursuance of the policy studiously there observed of disclaiming formal sovereignty, he is known as the "Legal Adviser" and the "Public Prosecutor". But the most honourable name for his office is "Attorney General", endowed as it is with such peculiarly English professional and historical associations.

The Attorney General has many capacities. He is the director of public prosecutions, the legal adviser of Government in all its branches, the advocate of the Government in the Courts, the official leader of the local Bar, the draughtsman of all Government measures, the exponent of these measures to the Legislature and to the Secretary of State, and, besides other incidental capacities, he is, as has been already noted, an active member of the Executive Council.

(1) MINISTER OF CRIMINAL JUSTICE

His functions are thus very varied, and we may perhaps most conveniently first consider him in his capacity of Minister of Criminal Justice and Public Prosecutor. All

criminal indictments are framed in the name of the Attorney General, and in the smaller Colonies he himself personally prosecutes in all cases committed to the Supreme Court.

In the larger Colonies he prosecutes through the Solicitor General, or the Crown Counsel or other officers of his department. In such minor Courts as try cases on indictment he is represented by a local practitioner, appointed for the purpose, or the prosecution is in the hands of some responsible officer of police. It is, perhaps, in this capacity—as the King's Attorney General, the appointed vindicator of the law, the avenger of crimes and misdemeanours—that he figures most prominently in the eye of the public.

As supervisor of all prosecutions of indictable offences, he acquires a further capacity of a peculiar nature—that is to say, he becomes the substitute for the Grand Jury. As we all know, at Quarter Sessions and Assizes the Grand Jury has the right to suppress any prosecution, which it thinks ought not to have been brought, by refusing to find a "true bill". There is, so far as I am aware, no "Grand Jury" in any of the Crown Colonies. It is for the Attorney General himself, therefore, to say in what cases a prosecution shall be proceeded with. Like his prototype at home, after a case has been committed and included in the Calendar, he has power to enter a *nolle prosequi*. But this is hardly enough. It is clearly undesirable that the parties and witnesses should be brought from some distant island or district for the purpose of a case with which the Attorney General may decline to proceed. It is an obvious development therefore that before committing a case the magistrate should forward the depositions to the Attorney General and should only commit if the Attorney General (or his appointed subordinate officer) thinks it worth while to

proceed. The next step is clearly that the Attorney General (or his officer to whom the case is referred) should draw the attention of the magistrate to certain lacunae in the case—and should recommend that some further witness should be called, or that some witness who has been already called should be recalled for further examination. From this it is only a natural transition to a system in which the examining magistrate acts throughout under the instructions of the Attorney General and his officers. This is in fact the very singular, but very interesting system, which has been developed in Ceylon. Indeed it has gone to a yet further length, for in that Colony it is open to the Attorney General, after a magistrate has dismissed a case, to instruct him to reopen it, to call further evidence and to commit it for trial. Such is the system, as it has developed in Ceylon. Whether there have been corresponding developments elsewhere I am unable to say.

Speaking with experience of this system, both as Attorney General and as Chief Justice, I regard it as an excellent and indeed, in the local circumstances, as almost an indispensable system. The magistrate who is investigating a case may not be an officer of experience. Not being, as a rule, a member of the legal profession, he does not realise the difficulties which may present themselves in Court and on which the case may be wrecked. I have repeatedly tried cases which, as it seemed to me, could not have been efficiently presented in any other way. Certainly it is impossible to conceive a more careful and conscientious investigation than that which the system secures. It has, however, one drawback and that is a very serious one—delay. If a case is thus suspended it may be some weeks before the papers are returned to the magistrate with the necessary instructions. The scene of the crime may be some distant waste or jungle. It may take some further

time to secure the new witnesses, and the magistrate may not be sitting at the Court where the examination is held for a further interval: the papers must again go to the Attorney General's department; a witness may abscond, or an absconding accused may be arrested. This involves a further postponement. Meanwhile the Assizes may come and go, and the case must be postponed till the next Assizes, and, if the prisoner is remanded, he is left to eat his heart out in jail. Delays of this nature are a serious price to pay for efficiency, and this may well be borne in mind when in a subsequent chapter we have occasion to consider a more summary method of trial.

It is easy to realise the volume of work that is involved in such a system, and the great power and responsibility which it commits to Crown Counsel, and it is also easy to understand how it has come about that in Ceylon the criminal work of the Attorney General has been devolved upon the Solicitor General and that no Crown Counsel is authorised to direct the dismissal of a case without the express approval of the Solicitor General himself.

(2) THE LEGAL ADVISER OF GOVERNMENT

The second capacity in which the Attorney General demands attention is that of legal adviser to Government. His opinion is freely sought not only by the central Government but also by all the departments in all legal difficulties that present themselves. He has to advise not only on points of law arising in disputes with members of the public, as to which he will himself be responsible for any litigation that may ensue, but also on the administrative tangles that are continually arising owing to the intricacies and unsuspected defects of local legislation. It is his business (though this is not always realised by his assistants) not to tighten these tangles by emphasising

the provisions of the law, but to suggest some way of getting out of them, and then to register the point for attention when next the Ordinance which has caused the trouble comes up for amendment.

It may perhaps be asked, How does an Attorney General who comes out from England, or perhaps from some other Government where some wholly different system of law prevails, find it possible to advise the Government on the basis of a system of law in which he has never been trained, and to the principles of which he is a stranger? The answer is, firstly, that the great majority of points on which the Attorney General advises are not theoretical questions on which it is necessary to have recourse to the fundamental principles of the common law, but practical questions of administrative law, depending on the interpretation of particular enactments; secondly, that, though a lawyer will hesitate to acknowledge it, in spite of apparent differences, all law is everywhere very much the same, and that in particular in the British Empire the influence of English law has been so great, and English Law Reports are everywhere so freely cited, that an English Attorney General, from whatever place he comes, soon finds himself at home; and, thirdly, that for the purpose of any particular local point of law he relies for help on his local assistants.

(3) THE REPRESENTATIVE OF THE CROWN IN SUITS AGAINST GOVERNMENT

Not only is the Attorney General the Government adviser, but in many places he actually personifies the Government for the purpose of suits against the Crown. It is provided by statute in many countries that all actions against the Government shall be brought against the Attorney General, and, when the Government is so sued,

it would in the ordinary course be the Attorney General himself who would appear on behalf of the Government. The Attorney General is thus not only the Government's legal adviser and personification but also its advocate in the Courts. The growing pressure of work upon the Attorney General in important Colonies, however, makes it increasingly difficult for him to appear in Court in person. It is a misfortune that this should be so. No one but the Attorney General himself, or where he has the assistance of a Solicitor General, the Solicitor General, can effectively embody the high traditions of his office. No one but the Attorney General or the Solicitor General in person, when vindicating the rights of the Crown, can give the weight that is due to the rights of the public.

(4) THE OFFICIAL LEADER OF THE LOCAL BAR

There is another capacity which belongs to the Attorney General and which may be here appropriately mentioned. He is the official leader of the local Bar. In that capacity he comes into personal contact with its leading members, and thus acquaints himself with a current of public opinion of which every Government is wise to take note. To the ordinary administrative official a member of the legal profession is not always a welcome figure. He appears too often as a troublesome interferer with carefully adjusted arrangements, as a raiser of inconvenient points, which without him would have been allowed to sleep. To the Attorney General, however, he is a member of a common profession, playing an assigned part in a necessary process. When changes in the law are in contemplation professional opinion is sometimes the most valuable, because it is the only instructed opinion, and an Attorney General may often save future trouble by consulting it in advance.

Private Practice

One may perhaps in this context be allowed to mention a connected subject, and that is the Attorney General's right of private practice. This was at one time general, but it is now gradually disappearing. This is in my opinion all to the good. The advantage of private practice is said to be that it brings the Attorney General into direct touch with the life of the country, gives him an insight into the inner working of things, and thus enhances his value as the legal adviser to Government and as a contributor to the general public life. In England the law officers no longer take private practice, but are paid very ample fees for their services. Colonial Governments are less generous or profuse. The salaries of Attorney Generals in most places have been slightly enhanced and they have been confined to their public duties. These in large countries are surely sufficient to occupy their time. Moreover, it is not desirable that the Attorney General should meet his personal clients round the Council board or in the Legislature. He will be freer to give his advice to the Government if he is without such local pecuniary connections. Still more is this true of his subordinate officers. But the question really settles itself. The public duties of law officers are nowadays so rapidly developing that if they are to be effectively discharged they leave no time for anything else.

(5) THE DRAFTSMAN OF LEGISLATION

The next capacity in which the Attorney General claims our attention is that of the draftsman of local legislation. The annual output of legislation in the countries governed by the Colonial Office is indeed astonishing. In all the thirty-six Legislatures of this varied realm every year fresh points present themselves for legislative action—admini-

strative difficulties that have arisen in the past year, new policies that require legislative embodiment, developments of old institutions that require a recasting of the whole. The immense growth of administrative legislation in our own time is very inadequately realised by the general public. It is as active in the Crown Colonies as anywhere else. The functions of Government are continually becoming larger and more pervasive. The process must find expression in legislation.

Consolidation

Moreover, as the Attorney General turns over the pages of the local Statute Book, he sees subjects distributed in fragments throughout its course—an original "principal Ordinance" in the far distance, and supplementary or amending Ordinances at intervals, providing for special cases, extension of scope, changes of nomenclature, unexpected legal decisions. Some day or other, when a sufficiently zealous Attorney General appears, all these Ordinances must be consolidated and recast into a lucid and orderly whole, drafted in modern forms of expression.

Codification

Consolidation is not the only thing that awaits the hand of the draftsman. There is also Codification. Law has to be administered in many of these regions by untrained magistrates. It is necessary that they should have the law presented to them in a definite form. They must have Codes of Evidence, of Criminal Procedure, of Civil Procedure—whether in the form of Rules of Court or otherwise. There must above all be a Penal Code. In old-established Governments these things are already provided, but in new territories where the legal system is being moulded into shape, they await the hand of the Attorney General.

Moreover, in many of these countries there are systems of family and customary law not yet reduced to written statutes. They are jealously respected by our Colonial policy. But they cannot perpetually remain enshrined in the minds of Chiefs or the recollection of oldest inhabitants. Some day sooner or later these local systems must be reduced to codes. Thus the Statute Books of the Crown Colonies, Protectorates and Mandated Territories are continually growing and, in a well-ordered office, the Attorney General has on the shelves around him all the legislation of the British Empire (not to speak of the annual *Journals of the Society of Comparative Legislation*) to supply him with precedents and suggestions when the time comes to address himself to the needs of his own region.

The Local Statute Book

These compilations of local statutory law are most carefully watched by the Colonial Office, and have now been reduced to an ordered system. New editions are periodically issued, embodying all amendments and additions up to date. Meanwhile amendments and additions are, as far as possible, so framed as to insert themselves into the existing plan. There are two ways of presenting the statute law of a country. One is that favoured by the Colonial Office, and familiar to lawyers at home in *Chitty's Statutes*, in which all the various enactments are collected together in subjects—so that each heading embraces in effect a sort of code. The other is that which follows chronological order and so presents a picture of the history of the legal and administrative growth of the country. I confess that in the case of an old and historic Government, like that in Ceylon, I favour the latter method.

One of the most notable things in modern legislation is the improvement which has taken place in the art of

draftsmanship. The principles expounded by Sir Henry Jenkyns, Lord Thring, and Sir Courtenay Ilbert have spread through the British Empire, and one reads with admiration the lucid, concise and logically presented enactments with which our new territories are being equipped.

I know no more laborious, more intricate, more exacting and at the same time more fascinating work than that of the drafting of a comprehensive legislative Ordinance. An Attorney General so engaged sees his work growing under his hand into a constructive whole. He has to bear in mind that Ordinances are made to pass as well as to operate, and he must labour to present his work in an attractive and ordered form. He must himself envisage his Ordinance in working. At the Parliamentary Draftsman's Office in London the draftsman no doubt works under detailed instructions from the department concerned, but the Colonial Attorney General must himself continually originate ideas and devise expedients. He must imagine every possible special case and difficulty in working, guard against inconvenient rigidity, provide means of imparting elasticity and adaptability to his general principles. On the other hand, he must set himself to anticipate suspicions and allay apprehensions, bearing in mind that it will be his task to pilot his Bill through a Select Committee, where he will have to reason with critics seated round a table.

Statements of Objects and Reasons

There is one incidental task which here meets him—in some Governments at any rate—the framing of a "Statement of Objects and Reasons"—a measure which was invented in India, and which has spread to countries within the range of Indian influence. This is a concise but persuasive explanation and justification of his Bill, which is published with it for general information, when it is first

gazetted, and which if judiciously drawn may assist public comprehension of its objects and forestall and divert opposition.

But such measures as these are not the only form of legislation with which the Attorney General may be concerned. If he is in office during a period of constitutional change, it may be his duty to draft the new Constitution of the Colony and his handiwork may be thus destined to become a historical document.

Subordinate Legislation

At the other end of the scale he may have to concern himself with "subordinate legislation"—that exuberant growth of modern times. No comprehensive administrative Ordinance is complete nowadays without a section declaring that "The Governor in Executive Council by Order in Council published in the Government *Gazette* may make Regulations for the carrying into effect of the provisions of this Ordinance, and in particular (without prejudice to the generality of power hereby conferred)" for a whole list of enumerated subjects. A shower of these Statutory Regulations descends upon the fortunate country every year, and it is one of the Attorney General's tasks to scrutinise them for the purpose of judging whether they are *intra vires*, and to defend them in the Courts, if they are impugned.

Nowadays it is customary to arm not only the central Government but also subordinate and local authorities (subject to the approval of the central Government) with this free power of supplementary legislation. The Courts, too, add to the general output by issuing from time to time new or amended Rules of Procedure. All these Rules and Orders tend to get buried in the Government *Gazette*. It should be the duty of the Attorney General to collect all this

legislation into a compilation of "Statutory Rules and Orders", and to issue an annual supplementary volume, as is done in England. But, so far as Ceylon is concerned, so heavy are the calls upon the Attorney General that neither I myself, nor any of my predecessors or successors have been able to attempt the task.

It is customary to provide that all such Statutory Rules and Orders shall be laid upon the table of the Legislative Council and shall be subject to disallowance by vote of the Council, but in my own experience no Legislative Council has ever exercised its powers under this provision.

(6) THE EXPONENT OF BILLS IN THE LEGISLATURE

The Attorney General has by no means finished with his legislative work when he has drafted his Bills and issued them to the world. It is his further duty, in most cases, to introduce them into the Legislative Council, to defend them in debate, and to work them clause by clause through a Select Committee. Bills are often of so detailed and technical a character, or of such slight or occasional interest, that they are most appropriately explained by their author. Large measures of general policy, on the other hand, are often more appropriately introduced by the Colonial Secretary, though even here it is useful to have the Attorney General on the Select Committee to which any such Bill is referred, for the purpose of watching the effect of amendments.

(7) THE REPORTER ON LAWS TO THE SECRETARY OF STATE

Finally, when the various Bills at which he has laboured are passed and have been signed by the Governor, there still remains one further task for the Attorney General,

and that is to expound the new laws in a report to the Secretary of State. There are two ways of discharging this duty, which are variously adopted according to the temperament of the reporting officer. One is the formal and perfunctory—to say that "the object of this measure is etc....Section 1 assigns the Short Title and provides for the date of coming into operation....Section 2 declares etc....Section 3 establishes an authority....Section 4 provides for etc....Section 20 gives the usual power to the Governor in Council to make the necessary regulations". The other method is the enthusiastic and elucidatory, opening out to the Secretary of State the history of the subject, the objects of the measure, the difficulties that have been avoided and the manner in which it is expected to operate. Personally I have always found the work of legislation so interesting that I have never been able to resist the temptation to inflict this fuller form of exposition upon the Secretary of State. One thing remains to be said, and that is that the scrutiny of Colonial legislation by the Colonial Office is carried out with the most extraordinary vigilance and it is seldom if ever that any slip in drafting is not brought to the notice of its mortified author.

(8) MEMBER OF EXECUTIVE COUNCIL

To conclude this review of the Attorney General's functions with what was mentioned at the outset—he is an important member of the Executive Council. It is naturally his duty to watch the legal aspect of all questions discussed or circulated, even though they are not formally referred for his legal advice. But he has two particular responsibilities of a serious and sometimes of a painful character. Firstly, his advice is specially looked for on the consideration of capital sentences. The case has been prosecuted by his department, perhaps by himself. His own

legal experience gives special weight to his opinion. Further, by the Colonial Regulations he is the appointed Chairman of the Select Committees of the Executive Council to which are referred for investigation charges against public officers, which, if substantiated, lead in most cases to their dismissal from public service. These are aspects of his work on which no Attorney General will in retrospect willingly dwell.

(9) *PATER PATRIAE*: GUARDIAN OF PUBLIC RIGHTS

May I therefore be allowed to conclude on another note. Among the attributes of the Attorney General in English law there is this, that he is *pater patriae*, and as such the guardian of the interests of the public, and in particular of public charities. This function has been expressly accorded to him in Ceylon in connection with the law of trusts. This circumstance may be taken as typical of the dual duty which his office imposes upon him—at once to maintain the rights of the Crown, and to preserve the interests of the public.

Such are the duties of the Attorney General. In Ceylon in the *régime* proposed by the Ceylon Report he is destined (should it be adopted), like other officers of State, to assume a new form. He will no longer draft Bills, but by way of compensation will conduct elections. In the Legislature he will no longer be a Government advocate, but will become a legal adviser, and there will be no Executive Council in which he can play his special part. It is not likely that these experiments will be copied in other Colonies. If they are tried in Ceylon, the Attorney General's life will be less arduous than in the past—but, we may well believe, not less interesting.

II. THE POLICE

The next legal authority that claims our attention is that of the Police. It is unnecessary to say that an efficient police force is an essential element in every well-ordered Government. When we are discussing police it is natural for us to think of our own admirable force. Our own police, however, were not created. They were evolved. In their present form they are a hundred years old and they have their roots in the liberal institutions of a free people.

DIVERSITY OF CONDITIONS

As to the police organisations of the varied and numerous countries ruled by the Colonial Office, no one outside that office is qualified to generalise. In this, as in other spheres of administration, little of value can be said but what is based upon personal experience, and personal experience serves chiefly to disclose diversities of conditions. The police of the long-settled islands of the tropical West Indies differ widely from Greek and Turkish police of Cyprus, and these again from the police of Ceylon. All that can be said is that the quality and character of the police force in any country is the product of the human material of which it is composed and the length of time during which it has been subjected to sound influences.

INVESTIGATION OF MURDER CASES

The most sensational part of police work is the investigation of murder cases. At English Assizes murder is a rare crime. In two of the Colonies of which I have had experience—Cyprus and Ceylon—it is among the most frequent. Indeed in the latter the majority of the cases on the Calendar are homicides, and I am told that the same is true of Nigeria. The murders the police investigate in these countries are not the exceptional and unaccountable

accidents and outbreaks which they generally are in this country. They are a recognised, regular feature of life, and they often occur not among the ordinary frequented haunts of men, but in some out-of-the-way corner in the hills to which the police officer, when he hears the news, must hurry off on horseback, or in some remote village reached through jungle paths or long walks along the ridges of rice fields.

The first essential of an investigation is that it should be immediate. Villagers as a rule detest the idea of giving evidence. The murder may be a calamity to the village, but the trial will certainly be another. The murderer has friends and relations. Who will willingly antagonise these by giving information to the police? The police after the investigation will go away, and the witnesses will be left in the village to face the family of the man whom their evidence is destined to send to the gallows. "The dead are dead", said the Mukhtar of a village in Cyprus of a murder which I helped to try, "let us save those who remain.' Indeed it often happened in that country that the murder was a village execution. Everyone knew who had committed it. He had been paid to put out of the way some ruffian who was the curse of the place—who stole their cattle, and molested their women. Or—again to draw upon my own experience—the murderer might be a member of a gang. To denounce him would be to bring upon oneself the vengeance of his associates. Nothing can be more demoralising to a village than unpunished murders, and the police are well justified in their strenuous efforts to bring the truth to light. The all-important thing is to get to the spot, while people are still talking.

Or to take another crime, common in Ceylon—"gang robbery". A villager by careful saving and judicious lending has accumulated a small store and is reputed to

be well-to-do. A local bad character organises a scheme of attack with others of the same nature in surrounding villages—often a great distance away. They converge upon the spot—travellers pass them on the road—they are seen together in the village. In the middle of the night they assail the lonely house—strip and tie up the terrified inmates—break open their chest, rifle their collection of cash and jewels—murder those who resist—and march off in the night with bundles. A frightened child runs to the village headman, who sends for the police from the station many miles away.

For the purpose of such crimes—but more particularly for the purpose of murders, it is necessary to arm the police with special powers. Not only must they be able to round up all possible accused—but they must be able to detain witnesses, at least until the magistrate arrives, submit them to a rigorous examination and take statements from them.

The establishment of a well-directed police station in a district in which such crimes are liable to occur ought to be—and I believe often is—a protection to the decent people of the place. It becomes the constant resort of those who seek redress for wrongs, great and small. The nightly patrolling of the villages keeps evil in check. But such good as a police station does it can only do if it is strictly organised and rigorously and frequently inspected.

QUIS CUSTODIET CUSTODES?

Speaking not generally, but of one region of the East of which I have experience, one may say with confidence that the consideration which is most strongly present to the minds of those who are engaged in the task of shaping an efficient police force is—*Quis custodiet custodes*? To appoint a man as police officer is to invest him with power,

and in an unregenerate nature the possession of power is always accompanied with the temptation to abuse it. I have been speaking with reference to the East, but that human nature is much the same in other regions is indicated by the following extract from Lord Lugard's *Dual Mandate in British Tropical Africa*:

> No one with experience will deny the necessity of maintaining the strictest military discipline over armed forces or police in Africa, if misuse of power is to be avoided, and they are not to become a menace and terror to the native population (p. 205).

POLICE TRAINING

For the same reason it has been found elsewhere that the best means of imparting a sound tone to the police force is strict military discipline, accompanied by physical drill, emulation in sports and games, and a period of training in a fully organised police school. It is important at the same time to secure the best possible material for the higher officers in the force, either by recruitment from England, or, where this is possible, by local promotion, and to induce young men from the best classes of the local population to recognise that a career in the police force is an honourable career and to apply for sub-inspectorships. All these influences tend to induce a general habit of smartness, precision, and alertness, a pride in the police force—a sense of *esprit de corps*. Speaking from experience of a country in which strenuous efforts have been made on these lines, I can testify to their efficiency and also—one must add—to the perpetual disappointments that continually present themselves.

There is one pleasing particular in which this training manifests itself in Ceylon, and that is the beautiful brightness and cleanness of the police stations. They serve as a model for all public offices and institutions. Singularly

enough there is an exactly similar state of affairs, under very different conditions, in Cyprus. I can remember my muleteer, when planning a tour for myself and my wife, suggesting that we should sleep in the upper rooms of police stations, observing, "Wherever there are *Zaptiehs*, it is sure to be clean". These things in my view have a certain effect on character and are worth enforcing.

THE INFORMATION BOOK

One device for keeping police constables straight, on which great reliance is placed, is the "Information Book". A constable is trained to write down at once everything he does. If he goes out, he enters the exact time and says where he is going, and what he is going for. When he comes back, he again enters the time and a record of what he has done in his absence. If he brings someone with him, a statement is taken from that person. If a person comes in with a complaint, it is immediately written down and signed—the time being, as always, entered. At every important case this book is available for the use of the Assize judge, if he asks for it—and not unfrequently points favourable to the prisoner are disclosed and communicated to the defence.

EXCLUSION OF POLICE EVIDENCE OF CONFESSIONS

One indication of the care which is taken in Eastern countries to keep the police on right lines is the extreme jealousy which has been there developed as to the admission in evidence of any statement made to a "peace officer".[1] If a suspected murderer is arrested, either immediately after the crime, when everybody is talking about it, or at a later stage, after he has been lying hid in the

[1] I.e. a police officer or a headman.

jungle, he is almost certain to make some statement, which, whether it is true or false, generally throws some important light on the problem under investigation.

THE PRISONER'S STATEMENT

Now in English criminal procedure we are all familiar with the importance of the prisoner's statements. Two such statements are nearly always given in evidence—one made to the constable when the prisoner is arrested, and the other when he is brought to the police station and the case is entered in the register. On each occasion he is cautioned and on each occasion what he says is taken down by a police officer. Now in Ceylon these statements, whatever their nature, are excluded at the trial and cannot be given in evidence. The course by which this conclusion has been reached is a curious one, but the reason of it requires no explanation. In England it is considered that the police officer may be trusted to take down the prisoner's statement fairly and correctly, and that it will not be induced by pressure. In Ceylon there is no such confidence.

The history of the matter is this. In India (and presumably in all countries that have adopted the Indian Evidence Act) no "confession" may be given in evidence unless it is formally made before a magistrate. The police engaged in a case are considered to be necessarily partisans, and to be likely to apply pressure and inducements to secure the short cut of a confession. In India a statement which is exculpatory in form or intention is not considered a confession. But in Ceylon, thanks to a special definition which has been inserted in the Evidence Ordinance, it is otherwise. Any statement, whether inculpatory or exculpatory, if it is tendered by the Crown against the accused, as suggesting, whether directly or indirectly, that he is guilty of the crime, is considered as a "confession",

and if made to a police constable or to a headman is excluded. And this exclusion is in harmony with the general sense of public opinion. It is not considered to be safe to allow a constable to say what a prisoner said to him. The result is that a prisoner's statement, even though exculpatory in character, cannot be used in evidence against him.

RESTRICTION OF POLICE CUSTODY

Another rule inspired by the same sense of suspicion is that which takes the accused as soon as possible out of police custody. It is often of the greatest convenience for the police to detain an accused person in custody. If he is taken to the scene of the crime, he is almost certain to be impelled to talk. The sight of him in handcuffs encourages others to come forward and make statements. He hears these statements, and cannot resist interposing to correct them and give his own version. Even though the statement cannot be used in evidence, it may be useful, for it may open up some fresh line of investigation. Sometimes a sense of discouragement comes over the prisoner and he asks to be taken to make a statement to the magistrate.

The law in Ceylon—a law very difficult to enforce—requires that he shall not remain in police custody more than twenty-four hours, but shall be transferred to the custody of the ordinary jail. It is feared that the police will make some improper use of their power if the prisoner is left in their hands.

STATEMENTS BY PRISONERS ACCUSED OF PRAEDIAL LARCENY

The same jealousy is manifested in connection with another offence. One of the curses of an agricultural country in the Tropics is praedial larceny. The peasant's

crops and fruits, and the produce of the planter's estate, are at the mercy of nocturnal thieves. The problem is felt as acutely in Jamaica as in Ceylon. The offence is very difficult to cope with. In such a country every man has land and produce of his own. Who is to say that all he disposes of does not come from his own land or from the land of some relation? Many devices have been adopted to cope with these depredations, and one is to declare that any peace officer coming upon any person transporting produce by night, or under circumstances which suggest suspicion, may arrest him, and to cast upon the person arrested the onus of giving a satisfactory account of his possession. Now in England we should certainly receive in evidence the account given by the suspected person to the peace officer at the moment of his arrest. It is most important to have this. The story can be tested at once before the man is brought up before the magistrate. If when he comes before the magistrate he tells an entirely different story, this in England would be fatal to him. Not so in Ceylon. The peace officer's mouth is closed as to what was said to him by the prisoner at the time of arrest, or, it may be, afterwards at the police station. It is not considered to be safe to allow a policeman to put words into a possible victim's mouth. Public opinion—particularly the opinion of that part of the public which earns its living by defending prisoners—approves this precaution. Nor do the police authorities resent it. They prefer that their men should not be subjected to temptation.

I confess that I used to look forward to the day when in the process of evolution the stigma that at present rests upon the police force in such countries would be removed and a local policeman's account of a prisoner's statement would be received with something of the same confidence as that of a policeman in England. But judicial experience

has brought me to another view. I, too, feel it to be unsafe to allow a man to be convicted by words which a police officer or a headman may have put into his mouth.

III. PRISONS

It is necessary that we should consider the subject of Prisons. The apparatus of justice is not complete until it includes means of enforcing its decisions. The ordinary means of enforcing a criminal judgment—even in the case of a fine—in the last resort, is imprisonment. Civilisation has found no better means of protection against offenders than that of locking them up for a time, long or short, within stone walls and behind iron gates. It is necessary, then, to remember that the establishment and maintenance of a Colonial Government implies the existence of a Colonial Prison, with its administrative staff, and the same thing, it is hardly necessary to add, is true of Protectorates and Mandated Territories.[1]

And this of itself implies that all the thirty-six or so Colonial or Protectorate, or Mandatory Governments are faced with the same problems which we ourselves have of late been wrestling with in England.

REVOLUTION IN ENGLISH STANDARDS OF PRISON CONDITIONS

In England in recent years our ideas upon prisons have undergone a revolution. We no longer consider that, because we are bound to deprive a man of his liberty, we are also bound to make his life miserable in confinement—to subject him to degrading work, to make him wear

[1] It was at one time common to combine the offices of Inspector General of Prisons with that of Inspector General of Police. The combination still survives in Cyprus and Hong Kong, as well as in Uganda, Nyasaland, Tanganyika and Somaliland. It is submitted that the severance of the two offices is a more ideal arrangement.

offensive clothes, to crop his hair, to lock him up for long periods of solitary confinement. We have also had to consider the problem of the juvenile offenders, that of the classification of prisoners, and that of the employment of prisoners on their release.

All these things ought to be before the minds of the authorities responsible for prison administration in all our various Colonial Office Territories, but these authorities are deprived of two great resources. In the first place, it is not possible to organise a general Prison Service for all the Colonial Office Territories—directed by a common head and animated by common principles. In the second place, in most cases they lack the co-operation of an enlightened public opinion. Moreover, they are not in a position to pool their several experiences. At home the Governors of Prisons—whose status and quality has in recent generations steadily risen, and who in their modern outlook may in a certain degree be compared to the headmasters of public schools—have access to periodical conferences and instructive official and unofficial publications. Superintendents of Colonial prisons are without these advantages. Nor, as is natural in countries at the stage of development of our Colonial Territories, can they rely upon assistants and warders of the same quality as those available in our own country.

COLONIAL STANDARDS OF EFFICIENCY

One would reasonably expect, therefore, that such efficiency as can be attained in the prisons of these countries would lie in the direction of cleanness, order, discipline, kindliness of management, and effective and useful prison workshops. At the same time it must be borne in mind that in most cases the prison authorities are dealing with very primitive natures, who do not expect elaborate arrange-

ments, and do not acutely resent the routine of prison life. Indeed in times of scarcity they are even grateful for the good food and shelter which a prison affords. There is also this to be remembered, that in the case of district jails the District Officer is himself the Superintendent or Inspecting Officer, and so is able to infuse into the local administration something in the nature of kindly human interest.

Lord Lugard has some interesting remarks as to the primitive nature of prison arrangements in early days in Nigeria (p. 559). They had no jails or even houses other than the grass-mat shelters in which they all lived. Prisoners lived in the village and reported themselves for work each morning. A similar account of prison conditions in Fiji may be read in the work of a recent writer, Mr Justice Alexander, of the Supreme Court of Tanganyika (*From the Middle Temple to the South Seas*). The idyllic conditions he there describes have now been replaced by solid structures of stone and iron.

PRISONS OF NATIVE ADMINISTRATIONS

It is unnecessary to say that where native administrations have been established great care is taken as to the arrangements in the prisons under their control. Lord Lugard observes:

> It is somewhat curious how keen an interest the advanced native administrations in Nigeria take in these institutions in contrast with the horrors in their former dungeons[1]. The native prisons are now surrounded by imposing walls, kept scrupulously clean, and elaborate prison books are kept by the officials in charge.

[1] See Lord Lugard, *op. cit.* 3rd ed. p. 199, for a terrible description of the jail at Kano in 1902: "200 people were interned at night in a space of 238 square feet. Victims were crushed to death each night—their corpses were hauled out next morning. The stench inside the place was intolerable, though it was empty".

One of the greatest achievements in prison reform in our own time has been the establishment of Borstal institutions. It has not, so far as I am aware, been found possible to establish any such institution in any of the countries which are the subject of our study, though the problem has been considered carefully and in detail in Ceylon.

So also in another sphere of progress—the work of the "Probation Officer"—little if anything has been done. The difficulty is to find the type of men and women who discharge the duties of this office in England. It is to be hoped that the growing zeal for "Social Service", which is one of the features of our time, will make it possible gradually to advance in this direction.

It is impossible to inspect the prisons of a Colony without being conscious of the problems which in these as in other similar institutions elsewhere are calling for attention. One sees large numbers of prisoners serving short sentences; juveniles getting their first experience of prison life and likely to renew it; respectable villagers who have been betrayed into crimes of passion; persons guilty of murder whose sentence has been commuted; young clerks who have succumbed to the temptation of embezzlement, or Government servants who have ruined an otherwise blameless career by an act of fraud, and with them hardened criminals of a debased type. One is also conscious of the difficulties that must be presented in all such institutions by the women prisoners—fortunately comparatively few in number—many of whom are young women guilty of infanticide and others again of a corrupt character. One has to bear in mind, too, that, in the East at any rate (where the "false charge" has been highly developed as a weapon of warfare), some few at least of the inmates are the victims of false charges.

PRISON REFORMS IN CEYLON

It is encouraging therefore to note that in the prison system of at least one Colony, that of Ceylon, great strides have recently been made. Though it has proved impossible to establish a Borstal institution, the central prison—at which the young offenders have been concentrated—has been organised on Borstal lines; an advance has been made in the classification of prisoners; educational classes have been established, in which advantage has been taken of the educational capacities of such prisoners as are qualified for the work of teaching; an ordinary garb has been substituted for the old prison uniform; the services of boy scouts have been utilised for the purpose of imparting moral stimulus to the boys, while girl guides have performed a similar service to the young women, and efforts have been made to organise the securing of employment for prisoners on their release. It has also been made clear that an appointment in the Prisons Department is one to which the best of the young men in the country may fittingly aspire.

It would be interesting to learn what reforms on similar lines have been attempted elsewhere. Enough has perhaps been said to indicate one of the responsibilities of Colonial Government.

IV. CIVIL EXECUTION

I will conclude this lecture with a few words on the execution of civil judgments, partly to complete the picture of the organisation of law and justice on its executive side, partly to draw attention to an aspect of life in a Colonial and agricultural country, which is prominent there but to which we are strangers.

In all agricultural countries inhabited by peasant proprietors there is a constant demand for land, and at the

same time a constant demand for credit. The favourite form for the investment of savings is an advance upon a mortgage, and the supply of this demand for credit is one of the fields of action of the professional moneylender. Moreover, the peasant in primitive countries never has money in hand. He requires to borrow even for the smallest expenses, and if the expense for which he has to borrow is considerable, such as that of a wedding, he must charge his property.

The debts so created can only be enforced by judgment and by sale in execution of the judgment, and this causes sales in execution to bulk largely in the life of the place. A considerable "jurisprudence" (to use the French equivalent for "case law") inevitably develops. The Law Reports are full of cases on the technicalities of the law of execution, and the points involved are argued at the Bar with extraordinary pertinacity and animation. Land sold at a forced sale never brings in its true value, and the aim of the mortgagee is himself to bid and to secure the property for a song. Actions to set aside forced sales on the ground of non-compliance with formalities are familiar in all the Courts, and suits are continually being brought to set aside default judgments on the ground that there was no valid service of the initiatory summons. Even when a debt is not secured by mortgage, efforts are always made by the creditor to get the judgment charged upon the debtor's land and to secure the necessary priority, in such manner as the law provides, and the peasantry become astonishingly learned in the law of such matters.

All this indicates a sphere of action for which the Government in some form or other must make provision. Uninspiring as the subject may seem, it is one without which any conspectus of the organisation of law and justice would be incomplete.

Wherever there is a Civil Court, there must be an authority to whom writs can be issued in execution of its judgments for the sale of the land or goods of the unfortunate judgment debtor. That authority may be a special authority; it may be the police clothed with another name, or it may be the District Officer with his hierarchy of headmen. One comes vividly to realise, when one serves in the Colonial Service, that the execution of civil judgments by seizure and sale of property is a necessary part of the organisation of justice and one of the indispensable functions of Government.

CHAPTER VI

THE COURTS

The Chief Justice—His eminent position—The Puisne Judges—The Police Magistrate—The intermediate judiciary—(*a*) The centralised system—The Appeal Courts under the centralised system—(*b*) The decentralised system—Ceylon, Cyprus, and Palestine.

Alternatives to the Jury: (*a*) A composite court, (*b*) Assessors.

The Nigerian system—Its exclusion of advocates.

Native Courts.

Diversity of law in the Empire.

CONSPICUOUS as is the effectiveness of the various departments and institutions of the Colonial Office system of Government, there is no more signal success than that achieved by its Courts of Justice. In all parts of the world they enjoy unqualified local confidence and respect, and the confidence and respect thus enjoyed by the Courts is one of the chief supports of Government. It is no easy matter to give an account of this judicial system. In no sphere of Government is there more extraordinary variety. In this sphere, as in others, the judicial system of each country has been established and developed on the basis of local conditions. The arrangements established in one place are often in complete contradiction to those established in another. Though the administration of justice in all is imbued by a common spirit and a common tradition, there is scarcely a rule or practice which is of universal application. Such a system—or such a negation of system—may no doubt excite criticism. But it is impossible not to admire the boldness and versatility with which it has been carried through. It is this variety and adaptability of the Colonial Office judicial system that makes it so characteristically British.

THE CHIEF JUSTICE

There is, however, one point in which all these varieties agree, and that is, the position which they accord to the Chief Justice. To him is assigned a status apart from that of all other officers, as if to mark the sacredness of the principles for which he stands. Among the civil officers of the Crown he ranks in precedence next after the Governor. The Naval Commander-in-Chief ranks before him on such occasions as he may be at the seat of Government, and so does the Officer Commanding the Troops, if indeed he is of the rank of Major-General—and nowadays that rarely happens. But these naval and military officers, to whom this precedence of honour is accorded, are hardly felt to be of the regular framework of Government.

The Chief Justice thus precedes the Colonial Secretary, the legal and financial officers, and the heads of departments. He has direct access to the Governor, corresponding with him personally and not, as is the rule with other officers, through the medium of the Colonial Secretary.

THE PUISNE JUDGES

With the Chief Justice are—or at least ought to be—associated the other members of his Court. The principle which they embody is the independence of the Judiciary in its Court of highest resort, in all its relations with the Executive Government. I consider it a misfortune that in any place the Puisne Judges of the Supreme Court should have lost the precedence they once enjoyed over the members of the Executive Council, or that there should be any doubt about their right of direct access to the Governor. That independence of the Government for which our Supreme Courts stand they have never failed fearlessly to assert. This position has always been recognised

by the local population, in whose eyes it is more especially symbolised by the red robes which the judges of the Supreme Court wear when sitting in the administration of criminal justice.[1] The feeling thus inspired is in fact an asset of the Executive Government, as the population recognises and respects the justice of the Government in providing an impartial tribunal, which can, if necessary, decide between the Crown and the subject.

THE POLICE MAGISTRATE

The Chief Justice is the head of the judicial hierarchy, and having considered him in that capacity, it may next be convenient that we should pass to another judicial officer at the other end of the scale—the Police Magistrate. In one form or another he exists everywhere, and everywhere he is indispensable. His functions are twofold. In the first place he is the dispenser of summary justice in respect of all small offences. It is his business to keep order in his division by punishing promptly, adequately and discriminatingly all breaches of the peace, and minor offences against property. He is the force behind the police and the local headmen, as guardians of order, and he is, in the absence of any minor indigenous tribunal, the enforcer of all local by-laws and regulations. In the second place he has what are known as "non-summary" functions. He is the appointed investigator of more serious crime, destined for a more elaborate trial before a higher

[1] In Cyprus the red-robed judges of the Supreme Court (*οἱ κοκκινοφόροι*) travelling on circuit are the object of special respect. The following couplet appeared in a local broadsheet issued on the occasion of a murder trial at Limassol:

"ὡμίλησαν καὶ τακτικὰ ὁμὼς οἱ δικηγόροι
τόσον που ἐφοβήθησαν καὶ οἱ κοκκινοφόροι."

"And the Advocates nevertheless spoke so finely that even the red-robed judges were afraid."

tribunal. In particular he is the investigator of murder cases. When a murder is reported, it is his duty—at any rate in all countries within the influence of the spirit of the Indian Criminal Procedure Code—to hurry at once to the spot, at any hour of the day or night, and to commence to take the depositions. In these cases he is not a judge but an inquirer, and in a certain measure he is himself the prosecutor, for it is his business to pursue lines of enquiry that disclose themselves, and himself, if necessary, to direct the investigations of the police. In the exercise of this non-summary jurisdiction he is given a certain elasticity. Some offences, ordinarily not triable summarily, he may try summarily with the assent of the accused. Others again, if, as frequently happens, he is invested with powers of a higher order than those of an ordinary Police Magistrate, he may, if he thinks them sufficiently simple, take upon himself to decide there and then. The extent of these variations depends upon local legislation—which may be based upon more models than one.

In addition to this criminal jurisdiction he often also exercises a limited civil jurisdiction—either as magistrate, or under some other title—in respect of small civil causes, too trifling in importance for the higher tribunals, and he is in many places invested with the hearing and determination of "maintenance cases."

The qualifications of the Police Magistrate are very varied. Sometimes he has enjoyed actual professional experience. In such cases a Police Magistracy often leads to a Puisne Judgeship in a larger Colony. Sometimes he has formal professional qualifications, but no professional experience. Sometimes he has had local experience of a nature which is considered to qualify him for the work of a magistrate, or he may have done service in some other part

of the Empire, which marks him out as having that practical sagacity which is after all the most valuable quality of a Police Magistrate. In other places—as in Ceylon or the Straits—the appointments of Police Magistrates are made from the junior ranks of the local Civil Service. It is in this capacity that they exercise their first responsibility in the work of Government. In yet other places—as for example the great territories of Tropical Africa—the work of the Police Magistrate is discharged by the local administrative officers, while professional magistrates are, if possible, secured for the few urban districts.

In small Colonies—such as the lesser island Colonies of the West Indies—the Police Magistrate and the Chief Justice (for in such Colonies there is only one Judge of the Supreme Court) can do all the judicial work of the Colony between them. The Police Magistrate summarily punishes minor offences, commits others for trial before the Chief Justice and disposes of trifling civil causes. The Chief Justice tries criminal cases committed to him, generally in such Colonies with the help of a jury, and disposes of all civil litigation—cases involving small amounts by some form of summary procedure, and more important cases by a formal trial.

THE INTERMEDIATE JUDICIARY

But what is the system adopted for larger territories? Let us conceive ourselves placed in the position of a Secretary of State, called upon to make judicial arrangements for a country newly brought under British rule, such as Cyprus, or Palestine, or Kenya, or Uganda, or Tanganyika? What sort of framework should be adopted? There are two possible solutions (of course with gradations), namely, that under which the administration of justice is centralised, and that under which it is decentralised.

(*a*) THE CENTRALISED SYSTEM

Let us consider in the first place the centralised system. Under this system the whole administration of justice is centralised in the Judges of the Supreme Court. The Supreme Court Judges ordinarily sit at the metropolis. Here, at first instance, they deal with the great bulk of civil litigation. They exercise, as we are accustomed to say, an *original* civil jurisdiction. At the same time they exercise a civil *appellate* jurisdiction—i.e. they hear appeals from the local civil tribunals. As to criminal cases, here too they exercise an *original* jurisdiction, i.e. they try important criminal cases (in particular, murder cases), sometimes with a jury, sometimes with assessors, and they also exercise an appellate criminal jurisdiction—i.e. they hear appeals from the minor criminal courts. To relieve the Supreme Court of small matters, and also to relieve primitive villagers from long journeys to a distant and unknown town, the jurisdiction of the local Courts is sometimes enlarged beyond the ordinary limits of that of a magisterial Court, or Court of small causes. This is done in various ways—by the establishment of local District Courts, with a limited jurisdiction as in Uganda, or the Straits Settlements, or by the grading of magistrates as magistrates of the first, second and third class, and by investing them with jurisdictions of varying limits, which can be enlarged or restricted by executive orders according to local circumstances. Thus the ordinary limits of the jurisdiction of a magistrate of the first class in Kenya is £75 for civil matters, and two years imprisonment for criminal matters. But making allowance for all this, the system means that all serious cases, civil and criminal, are tried by the Supreme Court Judges in the exercise of their original jurisdiction—generally at the metropolis, but also, to such

extent as local circumstances permit, on circuit. In other words, no case, criminal or civil, of the first magnitude can be tried except by a judge of the first rank.

THE APPEAL COURTS UNDER THE CENTRALISED SYSTEM

The highest judges in the land being thus employed upon the direct trial of all considerable cases, what arrangements are made for appeals? It is always possible to say—"the fewer appeals the better", and to suggest that aggrieved parties can always appeal to the Privy Council, if an appeal is really necessary, and if the amount at stake is sufficient for the purpose; but I confess that I am not of this view. I consider that a free and full system of appeals is necessary, not only for the purpose of doing justice in particular cases, but also for the purpose of working out an ordered and logical system of law (through the effect of decided cases), and of establishing a sound practice, and a uniform and reasonable scale of punishments in criminal cases.

When the Supreme Court consists of several judges, no doubt an appeal could lie from a single judge to the Full Court. But it is not satisfactory that an appeal should lie against the decision of a judge to his brothers of the same bench, with whom he is daily working in co-operation. Moreover, in some places it would not be possible to constitute a Full Court without including the judge against whose decision the appeal is lodged. Thus in Hong Kong the Supreme Court Bench consists of a Chief Justice and a Puisne Judge. An appeal formerly lay from a decision by a single judge of this Court in the exercise of "original jurisdiction" to the two judges of the Court. Even now such an appeal lies from interlocutory and summary

decisions. In such cases an appeal is really a request to a judge to consider his decision afresh after consultation with a colleague.

A still greater difficulty necessarily presented itself in those small Colonies, such as Barbados, the Bahamas, Bermuda, or Grenada, where the Supreme Court Bench consists of the Chief Justice alone.

The result has been that in recent years in all regions of the Colonial Service, where this centralised system prevails, contrivances have been devised for mitigating these difficulties by calling in the aid of Supreme Court Judges from neighbouring governments. Thus in 1919 by Act of Parliament (9 and 10 Geo. V, c. 47) there was established a Court of Appeal for the West Indies, consisting of judges from Trinidad, British Guiana, Barbados, the Leeward Islands, Grenada, St Lucia and St Vincent. Other Colonies can be added by Order in Council. The Act also makes provision for the appointment of an additional external judge from the English Bar. The judge who delivered the judgment appealed against cannot sit on the Appeal. A similar Court was established in Eastern Africa by the Eastern African Court of Appeal Order in Council, 1921 (superseding a previous Order), consisting of the Supreme Court Judges of Kenya, Uganda, Nyasaland, Zanzibar and Tanganyika. In Nigeria (by the Supreme Court Ordinance, 1914, s. 4), the Supreme Court Bench for the purpose of appeals includes the judges of the Supreme Court of the Gold Coast Colony. In Sierra Leone the "Full Court" for the purpose of appeals can be constituted from the Supreme Courts of Sierra Leone, the Gold Coast, Nigeria and Gambia. In the Straits Settlements and the Federated Malay States the Supreme Court Judges of these Governments form a common bench for the purpose of appeals. At Hong Kong the Chief

Justice of H.B.M.'s Courts in China (i.e. the Consular Judge at Shanghai) is now added to the Supreme Court Bench for the same purpose.[1]

(*b*) THE DECENTRALISED SYSTEM

We may now turn to the alternative system under which the administration of justice is decentralised. This has been established in three countries, Ceylon, Cyprus and Palestine. Having had experience, or knowledge, of it in all three countries, I may perhaps be pardoned for contending that it is in many respects to be preferred to that just considered, and for expressing the hope that in due course it may be extended elsewhere. It has not, of course, been established in these three countries because the two alternatives were weighed and this was preferred. It was so established because existing institutions and local developments naturally and inevitably pointed in this direction.

THE CEYLON JUDICIAL SYSTEM

The system of justice in Ceylon is indeed so complete, so simple, and so judiciously designed that it well deserves to be taken as a model elsewhere. It is in my opinion the best system of justice in all its branches that the British Colonial Empire has produced, and it reflects the greatest

[1] The present writer has not ascertained to what extent an appeal under this arrangement lies against a capital sentence. Such appeals are provided for in Palestine and in the Federated Malay States (Ordinance, No. 14 of 1928, s. 14), and special provision has been made for appeals in capital cases from the Supreme Court of Zanzibar to the Eastern African Court of Appeal (see Order in Council, 1923). They have not so far been provided for in Ceylon, though the measure is strongly advocated by the legal profession.

In West Africa there is no Court of Criminal Appeal, and there is no criminal appeal except an appeal on special grounds to the Full Court.

credit on those by whose exertions it has been moulded into its present form.[1]

Under this system there are three grades of judicial officers, the Police Magistrate (who is also for the purpose of his civil jurisdiction known as "Commissioner of Requests"), the District Judge and the Supreme Court Judge. The Police Magistrate (or Commissioner of Requests) has jurisdiction in a "judicial division", the District Judge in a judicial district, and the Supreme Court Judge throughout the island. The Police Magistrate can impose a sentence of six months imprisonment or a fine of Rs. 100.[2] His civil jurisdiction as Commissioner of Requests extends to Rs. 250 (rather less than £20). Subject to certain not very restrictive limits, an appeal lies from any decision of the Police Magistrate (or Commissioner) to the Supreme Court and is tried by a single judge at the metropolis. In the exercise of his non-summary jurisdiction the Police Magistrate commits either to the District Court or to the Supreme Court, according to circumstances. Cases committed for trial before the Supreme Court are heard on Circuit.

The District Judge has a limited but considerable criminal jurisdiction, and tries on indictment cases committed to him by the Police Magistrate, but his civil jurisdiction—and this is the salient feature of the system—is absolutely unlimited. All civil cases, therefore, of whatever importance (not within the jurisdiction of a Minor

[1] One point of interest in the Ceylon system may be noted, that in none of the statutes that regulate it is there a single provision which makes any racial discrimination.

[2] These are most reasonable limits. The limit of two years imprisonment accorded to a "Magistrate of the first class", in countries where the Indian model has been adopted, goes beyond any natural jurisdiction of a magisterial court, as we understand it in this country.

Judge), are dealt with by this local tribunal. An appeal lies to the Supreme Court.

Thus under this system, except for the purpose of appeals, the administration of justice, both criminal and civil, is decentralised and brought to the doors of the people. All questions, criminal or civil, in which the inhabitants of a village are interested are tried at a place to which they have a reasonably easy access, and where they may watch the course of justice.

The District Judgeships in Ceylon are filled partly by members of the local Bar (some with mainly forensic, others with mainly official experience) and partly by members of the local Civil Service, who have special judicial aptitudes or preferences.[1] And it may be noted at this point that—save in a few exceptional places or for the purpose of a few exceptional cases—both magistrates and judges are purely judicial officers. They are not at the same time charged with executive functions. The judiciary is thus independent of the Executive. And, though it is the case that these judicial officers are pursuing a mixed judicial and executive career, for the time being they are judges alone, and are careful so to regard themselves.

The Supreme Court judges are chosen partly from the general Legal and Judicial Service, partly from the local Bar—official and unofficial. This secures a Bench of peculiar strength, uniting as it does experience of the

[1] In India members of the Indian Civil Service are allowed on attaining a certain stage to elect to follow a judicial career, and are eligible ultimately for appointment to the High Court. The same system obtains in the Straits Settlements and the Federated Malay States. But such promotion would not be in accordance with public or professional opinion in Ceylon, where the professional qualifications of Judges of the Supreme Court are considered to be of its very essence.

English Bar, and other systems of jurisprudence within the Empire, with experience of the local law—judge-made, customary and statutory—and knowledge of the conditions of local life.

The functions of the Supreme Court under the decentralised system are thus the most dignified conceivable. Its judges reserve themselves, partly for the trial of homicides and such other grave crimes as are fittingly committed to the highest tribunal in the country, and partly for the hearing of appeals, and a few matters of a special character such as writs of Mandamus.

It is on circuit that the Supreme Court of this Colony makes the strongest impression. The state and ceremony of the English Assize system are strictly observed. The judge on his arrival is met by the District Officer, just as the Assize judge is met by the sheriff in England. The session opens with an official religious service attended by the District Officer, the Bar, and apparitors bearing the sword and mace of the Court. The judge is attended by an escort and received by a guard of honour. All trials are by jury, without distinction of race. The jury system, established by the courage and prescience of a great Chief Justice, Sir Alexander Johnstone, whose memory is still cherished by the people, has been in force for over a hundred years. The prisoner may elect to be tried either by an English-speaking jury or by one speaking one of the languages of the country. He usually chooses the former, and a jury so chosen generally comprises all the elements of the local population both European and Ceylonese. Sometimes, however, a Singhalese-speaking jury, or a Tamil-speaking jury is called for. In such cases it is a most impressive sight for an Englishman to see this ancient institution of his own country thus transplanted and successfully working in a sphere unimagined by his fore-

fathers. It is certainly among the experiences which I myself most value to have seen a jury composed of respectable Singhalese village landowners, in the simple but dignified costume which they wear on such formal occasions, trying a capital case, in which the life of one of their fellow-countrymen is at stake, and having to determine under the intricate provisions of a Penal Code, based on a draft of Lord Macaulay, whether the prisoner is guilty of murder, or of "culpable homicide not amounting to murder" (or as we should phrase it, "manslaughter").

The jury system, thus in force in Ceylon, is established in many other regions of the Colonial Service. It prevails in the West Indies, where most of the various Colonies were settled or re-constituted in the atmosphere of the English common law. So also, wherever the Indian Criminal Procedure Code has been adopted as the basis of Criminal Procedure (as in the East African Territories) the jury system is in force to the same limited local extent as it is in force in India. It is also in force in Lagos and in other West African centres. But nowhere else in the Empire has a jury system on such liberal principles so firmly rooted itself, or become so cherished an institution in the life of the people as in the Colony of Ceylon.

ALTERNATIVES TO THE JURY

At this point, as we are about to pass to Cyprus, we may ask ourselves, what are the alternatives to the jury system that have been elsewhere adopted for the trial of capital cases. There are two such alternatives. One is the system adopted in Cyprus and Palestine, and the other that of a trial with assessors.

(*a*) THE SYSTEM OF CYPRUS AND PALESTINE

In Cyprus the judicial system at the time of my service there was very much on the same lines as that of Ceylon—with this exception, that the President of the District Court was an officer of external professional experience, and was assisted by two colleagues, representatives of the local Greek and Turkish communities. The President, sitting alone, and his two colleagues sitting together constituted a magisterial court. Sitting all three together they constituted the District Court which, as in Ceylon, had an unlimited Civil Jurisdiction. The Supreme Court, which here also was confined (with certain few exceptions) to appellate and Assize functions, consisted of two judges, and when they went on circuit they united with the judges of the local District Court to form the Assize Court. This Court of five judges was one of the most admirable Courts of which I have ever had experience. Indeed it may well be considered a better tribunal than the ordinary jury. Five judicially trained minds—two of them with an intimate knowledge of the life of the country—are a better instrument for determining the truth than twelve citizens chosen at random.[1]

The Palestine Courts, under the system established by the Mandatory Government, follow generally the model

[1] The Cyprus judicial system has been recently revised by an Order in Council which came into force on October 1, 1927. The Supreme Court now consists of five judges and includes two local judges, one a Christian, the other a Moslem. It may sit in three divisional Courts, and now has an original jurisdiction in civil cases (defended actions involving more than £300). The composition of the Assize Courts is also modified. These modifications somewhat disguise the simplicity of the original scheme, but do not affect the fundamental character of the Court.

of Cyprus, except that the English judges of the Supreme Court go on circuit singly and an appeal lies from a sentence of an Assize Court to the Full Supreme Court, even in capital cases.

I have spoken eulogistically of the legal system which prevails in Ceylon, Cyprus and Palestine, but it must be borne in mind that this system is only feasible where the population has attained to a certain standard of civilisation, where there are well-organised communications, where there is a local Bar resident and practising in the district, and where there is reasonable accommodation for the concourse of people of various classes which accompanies the sitting of an Assize Court.

(*b*) ASSESSORS

We have thus briefly considered the two alternative systems of judicial organisation—the centralised and the decentralised. In the one, all important cases are heard by a judge of the Supreme Court, with an appeal to a tribunal diversely constituted. In the other, all such cases (except serious crimes) are heard by a local District Judge, with an appeal to the Supreme Court.

We have still to speak of the second alternative to trial by jury—that is to say, trial by a judge with the assistance of Assessors. This exists in various forms in various places. We may conveniently take for our starting point the Indian Criminal Procedure Code. Here the qualifications for assessors are very wide. Subject to certain exemptions, every male person between the ages of twenty-one and sixty is placed upon the list (s. 318). They are two or more in number (s. 284). At the conclusion of the trial the judge sums up the evidence and requires each assessor to state his opinion orally (s. 308). He records that opinion, but is not bound to conform to it. In other words, the functions

of the assessor are only advisory. The Indian Criminal Procedure Code having been adopted in our East African Territories—Kenya, Uganda, and Tanganyika—this is the system of assessorship there in force.

In the Federated Malay States all capital cases are tried with the aid of assessors. Here again the qualifications of the assessors are very wide, but their functions are more important. If the Court and the assessors disagree, there must be a new trial (Courts Enactment 14 of 1918, ss. 185–197).

In West Africa the Indian Criminal Procedure Code has not been adopted. Assessors are persons with special qualifications, and are not selected indiscriminately, but their functions are advisory only. In the Nigerian Protectorate they are not obligatory. They are seldom employed in the Northern Provinces.

THE NIGERIAN SYSTEM

There remains to be considered one system of justice, which can hardly be described as an alternative system, but must rather be regarded as a wholly special system, to be justified by the peculiar circumstances of the case. I refer to that in force in the Protectorate of Nigeria—the creation of the original and constructive mind of Lord Lugard, our greatest Colonial administrator.

In Nigeria the system of justice in force has the following special features:

(1) The Supreme Court, except where "non-natives" are concerned and except for the purpose of transferred cases and civil appeals, does not exercise its jurisdiction throughout the country, but only in the Colony proper (1/240 of the whole) and in certain limited scheduled areas.

(2) Through the greater part of the territory under the control of the Government, the Supreme Court is replaced

by the Provincial Courts, which are composed of the Residents (that is to say, the principal District Officers) of the Provinces, together with their subordinate District Officers—the Residents having (like the Supreme Court elsewhere) unlimited jurisdiction both criminal and civil.

(3) The legal profession is excluded from the Provincial Courts, and is only allowed to appear in civil appeals from the Provincial Courts to the Supreme Court under special circumstances.

(4) The Provincial Courts exercise their jurisdiction concurrently with a widespread system of Native Courts, which in the most advanced areas now dispose of the bulk of the judicial work, being authorised to try even capital cases. They act under the close supervision of the Residents, and they exercise their functions without appeal to any legally qualified tribunal.[1]

To one accustomed to judicial systems in force in other parts of our Colonial Empire these features certainly wear a very extraordinary aspect, but there are two things that are learned in the Colonial Service. One is that it is unwise to express an opinion of local arrangements without local knowledge and experience, and the other is that no general principles are of universal application, and that in the words of Burke, "Circumstances . . . give in reality to every political principle its distinguishing colour and discriminating effect".

The system now in force throughout the Nigerian Protectorate had been in force in Northern Nigeria for nearly fifteen years before Lord Lugard carried through amalgamation in 1914. It was extended to the whole Protectorate with the full concurrence of the two Chief Justices of

[1] It will be observed that this Nigerian system is highly "decentralised".

Northern Nigeria and Southern Nigeria. It is impossible for anyone to read the Memoranda of these two Chief Justices, and the *Report* of Lord Lugard, which accompanies them (*Report on the Amalgamation of Northern and Southern Nigeria*, Cmd. 468, 1920, paras. 44–45 and pp. 75–82), without feeling that it is not for those who have not had the experience of these three officers confidently to express a contrary opinion. It must strike anyone that to establish the Supreme Court system as it exists in Ceylon in a country of fourteen times its area and four times its population, inhabited by primitive tribes and with a very rudimentary system of communications, would be a task which any statesman might well hesitate to attempt. When the Chief Justice of Southern Nigeria reports that "Assizes could only be heard in a limited number of places, and had therefore to be tried at great distances from the scene of action, and at infrequent intervals; that prisoners were kept for long periods awaiting trial, and cases broke down owing to the absence of witnesses, who had often to be treated as prisoners themselves"; and further that the Supreme Court's activities were circumscribed by the fact that it was never adequately manned, and when the same Chief Justice observes that the Provincial Court system "brings English justice practically to the door of everyone", one would prefer to disclaim the task of criticism and to apply oneself instead to a description of the system as it actually works.[1]

Before doing so, however, I may perhaps be allowed to

[1] At the same time it will be interesting to watch the working of the experiment which is being tried, by a Governor of Nigerian experience, in the Mandated Territory of Tanganyika, in an area as large as Nigeria, though with a much smaller population, and among a people at least equally primitive. Here the Supreme Court exercises its jurisdiction throughout the Territory and the Bar has a substantial though restricted right of audience.

notice a defence put forward on behalf of this system by its most unqualified advocate—the late Mr Temple, at one time Lieutenant-Governor of Northern Nigeria, in his book *Native Races and their Rulers*, on p. 191:

> "It is only the political officers", so he declares, "whose daily work brings them into contact with natives and their affairs quite apart from any judicial questions, who are in a position to acquire that experience necessary to enable an officer to administer justice among natives.
>
> "I maintain therefore that the system of Provincial Courts, with political officers as judges, adopted during the two administrations of Sir Frederick Lugard, is not only justifiable, but the only sound system.
>
> "No judge of...a Supreme Court in West Africa", he continues, "has ever acquired a native language, and is not expected to do so. This one fact alone, in my humble opinion, is a sufficient argument, were there not many others, against extending the jurisdiction of the Supreme Court over unsophisticated natives."

Mr Temple is an advocate dangerous to the cause which he defends. His principle, carried to its logical conclusion, would lead to the disestablishment of all the Supreme Courts in large regions of our Colonial Empire, and certainly in all parts of Tropical Africa, except certain metropolitan and commercial centres. It is a sounder position to argue that the Provincial Courts System of Nigeria is a stage in an evolution, and that, though perhaps necessary for the present, it is destined in due course gradually to give place to another system, under which judicial functions shall be differentiated from executive.

The system as it now works is based upon three Ordinances:

(*a*) The Supreme Court Ordinance, 1914.

(*b*) The Provincial Courts Ordinance, 1914.

(*c*) The Native Courts Ordinance, 1918.

The Supreme Courts Ordinance schedules certain commercial areas within which the Court may exercise its jurisdiction (s. 22) and authorises the Governor (s. 21) to add places or parts of the Protectorate to the areas so scheduled. It also creates the peculiar office of Commissioner of the Supreme Court within the areas so assigned. Every magistrate and District Officer within these areas is *ex officio* a Commissioner of the Supreme Court, and himself constitutes a Court. He has a small initial civil and criminal jurisdiction, which may be increased by the Chief Justice. An appeal lies to the Supreme Court and he has to report all his proceedings to that Court, which without hearing argument is empowered to revise his decisions and make any order that justice requires.

As to the Provincial Courts, the Resident in charge of a Province (and it must be remembered that these Provinces are very extensive areas) himself constitutes a Court, and has unlimited civil and criminal jurisdiction. District Officers of lower rank hold the lesser office of "Commissioner". They have a smaller civil and criminal jurisdiction, which the Governor in any particular case may increase (s. 6). Lord Lugard assures us that many of the Political Officers in the Nigerian Service are qualified barristers and solicitors, and that this circumstance counts for promotion and for enlargement of jurisdiction.

It is recognised that this system is one of a special character which may require special safeguards. There are in fact three such special safeguards. One is the Supreme Court's power of transfer; the second is the necessity of submitting the Court's criminal sentences for confirmation; and the third is the right of appeal in all civil cases to the Supreme Court.[1]

[1] Note that for the purpose of these transferred cases and appeals the Supreme Court exercises its jurisdiction throughout the whole Protectorate and not merely in the scheduled areas.

The Supreme Court may transfer *any* case from a Provincial Court to the Supreme Court (Supreme Court Ordinance, 1914, s. 34). The Resident may do so (subject to the consent of the Supreme Court) on his own initiative (Provincial Courts Ordinance, s. 14). Mr Ormsby Gore assures us that in practice all land cases are now so transferred.[1] I understand that in all classes of cases transfers, when applied for, are readily granted.

Next, as to the confirmation of criminal sentences—all sentences of death, of more than six months imprisonment, of whipping to the extent of twelve strokes, and all fines of £50 and over must before taking effect be confirmed by the Governor. What is more, every month the Provincial Court must submit to the Governor particulars of its criminal proceedings. The report operates as an appeal, and the Governor may issue any such order as he thinks just. For the purpose of the exercise of his powers of revision he has a legal adviser. He may delegate his functions of revision to a Lieutenant-Governor or to a judge of the Supreme Court.[2]

It should, however, be noted that, even when allowance is made for all these safeguards, the system embodies an unparalleled fusion of executive and judicial capacities. In many parts of our Colonial Empire such a fusion has been found to some extent unavoidable. All over Tropical Africa it is in force so far as the lower grades of the judiciary are concerned. In Nigeria it has been carried to its full possible extent. This has been done not on grounds

[1] *Report of visit to W. Africa*, 1926, Cmd. 2744, p. 117. This statement is probably too sweeping.

[2] An ex-judge of the Supreme Court has described the Criminal Provincial Courts as "executive Courts with an appeal to the Executive"—and whatever their merits, this is clearly what they are.

of theory but by a natural development. At the time of the amalgamation of Northern and Southern Nigeria, the Supreme Court system (in the opinion of the Chief Justices) had broken down and become ineffective in the south; the Provincial Court system had for many years proved successful and effective in the north. It was natural, therefore, that the northern system should be made universal.

Here again Mr Temple[1] is a dangerous advocate for the cause he favours. Describing the process by which the Political Officer first investigates a case and then determines himself to try it, he notes with apparent satisfaction that in such a case he fills the parts of police, prosecution and defence, counsel on both sides, judge and jury. It is more satisfactory to see this question approached in the spirit of Sir Charles Orr:

> On the other hand the system possesses one very grave defect. It may happen that the official who deals judicially with a case is the very person to whom in his executive capacity the crime was first reported, and who arrested the accused, collected the evidence and held the preliminary investigation. Under such circumstances, the position becomes one of great difficulty, and demands a balanced judgment and self restraint of the highest order. The appointment to each Province of a Police Officer, who could undertake the preparation of cases for trial in the Provincial Court, was a great assistance in this respect.[2]

Such is a brief outline of this very carefully devised system. Interest will no doubt be aroused as to the terms of the enactment excluding advocates from audience and as to the grounds on which that exclusion is justified. The terms of the enactment are as follows:

> 33. (1) In no cause or matter before a Provincial Court shall the employment of a legal practitioner be allowed.
>
> (2) In no appeal from a Provincial Court to the Supreme Court shall the employment of a legal practitioner be allowed

[1] *Native Races and their Rulers*, ch. x.

[2] *The Making of Northern Nigeria*, p. 232.

without the previous consent of the Chief Justice or a judge of the Supreme Court Division in which the appeal is made:

> provided always that such consent shall only be given when the appeal involves a question of law in the determination whereof the Court would, in the opinion of the Chief Justice or such judge be assisted by legal argument.

I may add that a similar exclusion is in force in Ashanti and the Northern Territories of the Gold Coast, and that in Tanganyika the legal profession has only a restricted right of audience. In Sierra Leone counsel cannot appear before a District Commissioner when he sits with native chiefs or assessors (Lugard, p. 543).

The justification for this exclusion is firstly that the institution of forensic advocacy is not native to the soil, and is not in accordance with local standpoints. In particular it is not a feature of Mohammedan procedure. A Mohammedan ruler remarked to Mr Ormsby Gore that he could not understand how we allowed "two professional liars to appear in a Court of law with intent to prevent the judge from ascertaining the truth". If this ruler is typical, he certainly does seem to indicate a standpoint very different from our own. Sir E. Speed, Chief Justice of Nigeria (Cmd. 468, p. 78) states that when the judicial agreements with the Egbas and Yorubas were being negotiated, the native authorities "one and all, and of their own accord, insisted on inserting a clause to the effect that they desired that lawyers should not have audience in the Courts established within their territories". Secondly, it is said that the Bar is not indigenous to the up-country provinces but comes mainly from other parts of West Africa; that its standards have not yet attained to those of England and that it foments litigation by touting; thirdly, it is contended that among such primitive peoples professional legal methods tend to obscure, rather than to elucidate the truth, and embarrass both the Courts and

the witnesses; and, finally, it is suggested that "the presence of Counsel taking part in the proceedings having higher professional qualifications than the Bench is not fair to the latter as tending to impair its authority, and destroy public confidence in its decisions" (per Speed, C.J.).

With regard to the last-mentioned inconvenience it may be remarked that it is one to which District Court judges in India, Malaya, and Ceylon are well accustomed. It is not for me to pass judgment on the point of view above explained. The united and emphatic testimony of the two Chief Justices endorsing this exclusion must receive due weight. I have myself derived too much assistance from professional advocacy to depreciate its value or importance. It may nevertheless be permitted to suggest on the one hand that even such an institution as the Bar is not always immediately transplantable into every soil, and on the other that the present supposed local standpoints, like the present judicial arrangements, must be regarded as transitional only and as representing a stage of evolution, and that ultimately, before British judges at any rate, the presence of counsel in Nigerian Courts may come to be regarded not as an embarrassment, but as an assistance.

NATIVE COURTS

We now come to the fourth special feature of the Nigerian judicial system—a feature which it shares in varying degrees with those of the other Tropical African Territories, the existence of an extensive concurrent native jurisdiction.

We have already seen that it has been the policy of the British Government through a very large part of its Tropical African Dominions to foster or to establish native administrations, to invest them with progressively enlarged powers, and to encourage both Paramount Chiefs

and the tribes and communities subject to their allegiance to take a pride in these local native institutions.

We have also seen that in Nigeria in particular these local institutions have developed in the most encouraging manner to an extraordinary extent. But we have also noted that it is essential both to effective rule by the Chiefs, and to the self-respect of both rulers and people, that the powers of these rulers should not be administrative only, but should include powers to enforce their authority through Courts of their own.

All through these great tropical Territories we find what are called "Native Courts" of various degrees of importance, but it is in Nigeria that they are established in the most systematic manner and with the most extensive powers. The Ordinance which regulates them is the Native Courts Ordinance, No. 5 of 1918.

The whole system is designed to be as elastic and adaptable as possible and is placed in the hands of the Resident, whose orders operate and hold good without reference to Government, until disallowed.[1]

The Resident by warrant constitutes the Court, determines the area of its jurisdiction, defines its powers, and nominates its members. He exercises a complete control over its proceedings, has at all times access to its records, and may suspend, reduce and modify its sentences or orders, or order a rehearing. A report must be submitted to him of all the cases tried by the Court. He may at any time transfer any case to his own Court.[2]

The Resident is thus empowered to adapt the Court to

[1] Native Courts of A Grade, i.e. with full powers, cannot be constituted without the Governor's authority.

[2] From this description it will be realised that the Provincial Courts and the Native Courts, both controlled by the Resident, are mutually inter-dependent and form two halves of a single whole, and that the whole system must be judged in its entirety.

the capacity of its members, and to the degree of civilisation to which any particular community may have attained.

The Courts thus vary from comparatively insignificant local Native Courts to Courts of great power and importance. These may be either (1) a "Judicial Council"—presided over by the Emir, or other Paramount Chief, and including as a rule in Moslem States an "Alkali" or other person learned in the law, or (2) a single-judge Court, presided over by an "Alkali" in Moslem States, or in the south by some person of judicial training. The law applied is the local customary law. In Moslem districts this is the Mohammedan law of the Maliki rite, and the Courts which apply it are distinguished by their learning and acumen.[1]

The power of life and death has been allowed to the most advanced Moslem Courts. The sentence is pronounced by the Emir, and this power is regarded as inherent in a Moslem ruler. "Now we know that the Emir is Emir indeed, since he has the power of life and death", the people of Ilair are said to have exclaimed. All cases in which sentence has been so pronounced must be submitted to the Resident and he must transmit them with his own report and recommendation to the Governor.

These Courts of course have their own rules of evidence, very different from ours, and the carrying out of a capital sentence in a trial where only these rules have been applied naturally presents difficulties, but the Secretary of State has ruled that

> unless the capital sentence has been passed for an offence which is not punishable by death under English law, or unless the facts

[1] *The Dual Mandate*, p. 56. As a lawyer I confess that I feel jealous that so much legal learning in an ancient system of jurisprudence should be exercised, without being perpetuated by means of Law Reports.

disclosed in the Alkali's report on the case, or in that of the Resident, are such that there is serious likelihood of a miscarriage of justice, if the sentence is carried out, the Governor and Executive Council are justified in accepting the verdict and sentence of a Mohammedan Court which has passed sentence within its powers, after a trial carried out in accordance with the procedure enjoined by the native law, and not obviously inequitable, even though that procedure is widely different from the practice of English criminal Courts.[1]

Mr Ormsby Gore, in his report on his visit to West Africa in 1926, speaks very highly of these native tribunals. The continuance of the administration of justice by these Courts he declares to be one of the corner-stones of the policy of indirect rule.

Since our occupation the native courts have greatly improved, and it is now estimated that 90 per cent. of all the judicial work in the Northern Provinces is carried out by them.

There has been also an immense improvement in the keeping of Court records. Experience has shown that the best native Courts are fully adequate to deal with nearly any kind of case.[2]

He also speaks warmly of their "deep knowledge of law and custom and their clear insight into the reliability of witnesses".

In the Mandated Territory of the Cameroons, now attached to Nigeria, these Native Courts have been zealously established and their working is watched with enthusiasm. Nevertheless a lawyer trained in other principles may well be excused for being conscious of qualms when he reads the following report from a junior political officer stationed in the Territory:[3]

The Native Courts have done their duty during the year with very good results. Their superiority over the alien Provincial

[1] Lugard, *The Dual Mandate*, p. 562.

[2] Cmd. 2744, 1926, p. 113.

[3] See *Report on the British Cameroons to League of Nations for* 1924, p. 28, C. 452 (h), M. 166 (h), 1925.

Court in settling the innumerable cases that come before them is apparent to the most obtuse observer. Where the European, driven by the dictates of pure reason, would have to dismiss 75 per cent. of the cases for want of evidence, the Chiefs work on intuition and the law of probabilities. Left to themselves they would scarcely trouble to call that fad of the white man's, the witness, in whose value the parties concerned are now coming to have an almost childlike faith, but whose parrot-like repetition of the principal's case would not deceive the most credulous. In dowry cases it is almost unknown for either side to tell the truth, and yet the Chiefs settle hundreds to the apparent content of both parties.

The Resident who quotes this report for the purpose of transmission to the Permanent Mandates Commission of the League of Nations, adds a comment of his own:

The witness referred to is the professional witness hired by either party to give evidence on his employer's behalf.

He further mentions, as indicating a general consciousness that justice has in fact been done, that, in the Native Court referred to, 707 cases were heard with only 21 appeals to the District Officer. Even with this explanation, however, one would venture to look forward to the day when the judgments of such Native Courts will be founded on evidence as well as instinct.

DIVERSITY OF LAW IN THE EMPIRE

The most extraordinary feature of our judicial system in the realm of the Colonial Office is the diversity of the law which our Courts apply. The judges of our various Supreme Courts pass on promotion from one system of law to another and are required immediately on their arrival in a new territory to administer a system of law, common and statutory, to which they are completely strange.

Those Colonies which were established by settlement

(such as Barbados, the Bahamas and Bermuda) are subject to the old common law of the mother country, supplemented by the various statutes by which it had been modified at the date of the settlement or which have been applied by local legislation. Where a Colony has been acquired by conquest or cession, the rule is that the Crown can make such legislative provision as it thinks fit, but that in the absence of such special provision, the existing system of law continues to prevail. Under these principles the British common law was introduced in various countries so acquired, but in others, in pursuance of Conventions or proclamations made or issued at the time of the annexation, the old law of the country was preserved. Thus in St Lucia, Mauritius, and the Seychelles as a dependency of Mauritius, the French law was preserved. So also the Roman-Dutch law was preserved in Ceylon and British Guiana. Spanish law was perpetuated in Trinidad, but has now been practically extirpated by statute, surviving perhaps only in a few vested interests. In Cyprus we boldly took over the Turkish law, which consisted of the old Mohammedan Sacred Law, supplemented by a large quantity of Turkish codes and other legislation. The Turkish text in the case of all legislative enactments was of course authoritative, and our courageous judges had to ascertain the meaning of this text by the help of interpreters or by themselves learning the language and studying both the text and Turkish commentaries. A colleague of mine, the late Sir Charles Tyser, translated from the original Turkish the whole Civil Code as well as an authoritative treatise on the law of Vaqf. But behind all legislation was the old common law of Islam and I remember myself declaring that the utterances of the Prophet, as recorded in the Quran, and interpreted by the Imams, were still the law of Cyprus. But this was not all. In a period of

reforming zeal the Turks had passed a series of Codes, all modelled upon the French, in particular a Penal Code, and a Commercial Code. Although the Turkish text was authoritative, the principles which it embodied were the principles of the French law, and I myself frequently considered that it was necessary to have recourse to French legal treatises in order to ascertain the presumed intent of the Turkish legislator.

One curious result of our scrupulous respect for the *status quo* is that in our various colonial possessions we preserve systems of law which have elsewhere become extinct. Thus in Cyprus the law is the Turkish law as it was in 1878. In Palestine it is the Turkish law as it was in 1917. Both these phases of the law have now ceased to exist in Turkey. The modern Turks, with sacrilegious hand, so far as their Civil Code is concerned, have ruthlessly extinguished their old sacred law, which is still piously preserved as the common law of Cyprus and Palestine and in its place they have enacted a new code, based upon the Swiss model. So also the Roman-Dutch law, that noble system of jurisprudence, did not survive the era of the French Revolution, but in spite of inroads from English statutory law, and in spite of the insidious sapping of its foundations by English case law, and English legal education, it still survives in Ceylon. In South Africa, indeed, if I may incidentally refer to a Dominion outside the scope of our studies, it still flourishes in full vigour. But in British Guiana its day, alas, is done. In 1916, by the Civil Law of British Guiana Ordinance of that year it was systematically rooted out, and was replaced by the English common law and a series of enactments based on English principles. The only substantial remnants of the old system are the principle of *Legitimatio per subsequens matrimonium* and the Roman-Dutch law of property in land,

mortgages and real servitudes.[1] Finally, as to French law, the island of St Lucia having been acquired before the date of the Napoleonic codes, preserves in its code of 1879, in which its existing legal system was substantially embodied, the old French law of pre-revolutionary France. Some traces of the old French law are also said to survive in St Vincent. Mauritius having been finally acquired at a date after the enactment of the Civil Code, the Code of Civil Procedure and the Commercial Code continued to be governed by these enactments but not by the Penal Code, which was enacted at a subsequent date, so that the foundation of the criminal law of the island is presumably still the old French pre-revolutionary law.

Nor does this exhaust the complexity of the subject. In many countries there are particular communities with their own systems of family and customary law, which are carefully respected. Some of these have been reduced to codes, others have been left uncodified. Even where they have been codified, these codes are usually imperfect and require to be supplemented by interpretation based on the principles of the original law. All these principles are presumed to reside *in gremio iudicis*, so that some of our Supreme Court judges have a heavy burden to carry. Thus in Ceylon there are no less than four communities which have systems of their own, two of them codified (though one of these codes—that purporting to codify the law of the Moslem community—is altogether inadequate) and two of them uncodified. In the Straits Settlements there are similar special customary systems of law of which the Courts must take cognisance, and there are laws regulating the marriage, divorce and intestate succession of Parsis, which presumably require from time to time reference to the original law on which they are based. In Hong Kong

[1] *Journal of the Society of Comparative Legislation*, 1917, p. 210.

an Ordinance recognises the validity of Chinese wills made in accordance with Chinese law and custom.[1]

Finally, how does this question stand in our great Tropical African Territories? What is the system of law there administered? Here again we find, as in many other questions, a difference between the East and the West. Our western territories, gathered round the nuclei of our English Colonies of Sierra Leone, Lagos, the Gold Coast and the Gambia, naturally base their legal systems directly on the English law. Of the western attitude the provisions of the Nigerian Provincial Courts Ordinance, No. 4 of 1914, may be taken as typical.

By s. 10, it is declared that, subject to the terms of that or any other Ordinance, the common law, the doctrines of equity, and the statutes of general application which were in force in England on January 1, 1900, shall, so far as they are applicable, be in force in the Protectorate.

In all cases between natives, and also in all cases to which a native is a party, where justice so requires, the Court may take cognisance of native law and custom, such law or custom not being repugnant to natural justice, equity or good conscience, or express law[2] (s. 11).

In the great East African Territories, however, Kenya, Uganda and Tanganyika, the law has received an Indian atmosphere. Not only have the great codes—the Penal Code, the Criminal Procedure Code, and the Civil Procedure Code (subject to local modifications)—been taken

[1] On this subject see generally Ilbert's *Legislative Methods and Forms*, pp. 167–172.

[2] In deciding questions of native law and custom the Court may give effect to any book or manuscript recognised by natives as a legal authority, or may call native chiefs or other persons, whom the Court considers to have special knowledge of native law and custom and may require them to give evidence on oath (s. 11 (2)).

over in their entirety, but a number of important and far-reaching codes dealing with special departments of the law have also been adopted. These codes are no doubt based upon the spirit and principles of the English law, but the great Procedure Codes are English law in an Indian setting. It is only subject to these great statutes that English law prevails in East Africa.

The formula which best defines the basis of the law in East Africa is to be found in the Tanganyika Order in Council, of July 22, 1920. Article 17 declares that *subject to these three great codes*, the law in force shall be the substance of the common law, the doctrines of equity, and the statutes of general application in force in England, and that the Courts shall have the powers vested in and shall follow the procedure and practice observed by the Courts of Justice and Justices of the Peace in England—all this, save in so far as modified by Order in Council or proclamation, and so far as local circumstances permit and subject to such qualifications as local circumstances may render necessary, and it is further declared (s. 24) that, in all cases in which natives are parties, the Courts shall be guided by native law, so far as this is not repugnant to justice or morality, or to any special enactment.

Such then is a very compressed and imperfect account of the great system of justice maintained in the spacious and varied realm controlled by the Secretary of State for the Colonies.

CHAPTER VII

THE LEGISLATURE

I. The West Indies

Colonies acquired by settlement—Colonies acquired by cession or conquest—The West Indies abnegate their constitutions—Constitutional developments: Elected members: Communal representation—The modern West Indian Constitutions—The official majority—Jamaica—British Guiana.

II. The Far East

Ceylon and the Ceylon Report—The Straits Settlements—and the F.M.S.

III. Tropical Africa

West and East Africa—Contending ideals—The Kenya Legislature—The East African Report.

IV. Durbars and Advisory Councils

Malaya—Nigeria—Basutoland.

V. Councils of Chiefs

East and West Africa—Fiji.

ALL the numerous countries under the control of the Colonial Office, except Gibraltar, St Helena, Somaliland, Bechuanaland and Basutoland,[1] are endowed with Legislatures. In the excepted cases just mentioned the Governor or the High Commissioner exercises the power of legislation as far as legislation is necessary. There are thus over thirty Colonies, Protectorates and Territories each with a Constitution of its own.[2] Every one of these Constitutions has been founded and fashioned not on the basis of any rigid, uniform plan but in accordance with antecedents, local conditions and the various racial, political and economic circumstances that have from time to time

[1] See below, p. 199.

[2] The Leeward Islands, with a population of less than 150,000, supports six Executive Councils and five Legislatures.

manifested themselves. The shaping of each one of these Constitutions has been the subject of careful, detailed consideration and often of acute and prolonged controversy. Each of them has its own history. It would be a futile task for us to seek to investigate the growth and characteristics of these thirty or more distinct Constitutions. It will be possible, however, to submit them to a certain general survey and to examine some of the main lines of their development.

In this survey the Constitutions of the West Indian Colonies may seem to occupy a disproportionate share. But let it be borne in mind that the West Indies were the original nucleus of our Colonial Empire, and that it was out of the Constitutions of these Colonies that our manifold experience has been evolved.

The chief centres of political development with which our survey will concern itself are three in number: I. The West Indies (and herein in particular Jamaica and British Guiana); II. The Far East (and herein in particular Ceylon); III. Tropical Africa (and herein in particular Kenya).

I. THE WEST INDIES

COLONIES ACQUIRED BY SETTLEMENT

Let us begin then with the West Indies and in the first place let us realise the fundamental distinction which existed between Colonies acquired by settlement and Colonies acquired by conquest or cession. In the case of Colonies acquired by conquest or cession the Crown possessed a free despotic power of legislation and could establish and mould a Constitution at its will. In Colonies acquired by settlement, however, the British settlers were conceived as carrying the common law of their country

with them. In such Colonies the Crown could indeed create a Constitution, but only one which comprised a representative body having powers of taxation. It could not legislate for it by Order in Council or otherwise.[1]

In pursuance of this principle, as Colonies were settled both on the mainland of North America and in the islands of the West Indies the Crown everywhere established free elective representative bodies, known as "Assemblies", generally accompanied by an Upper House, known as the "Legislative Council". Three of these Constitutions still survive, namely those established in the Bahamas, Bermuda and Barbados. Each of these Colonies has an Assembly, freely elected by the people, and an "Upper House" in the form of a Legislative Council, but the Lower House, as in England, is the really predominant body. Barbados has also a special institution known as the "Executive Committee", of which more will be said hereafter.

These three Constitutions are very pronounced exceptions to the general scheme of Colonial Office Government. All the members of the Assemblies are elective. There are no official members. If the Government desires to have one of its officers a member of the Assembly he must contest a constituency at a popular election. All three Assemblies vote the annual estimates, and in the Bahamas and Bermuda the Assemblies have even the right—a right otherwise unknown in our whole Empire—of initiating money grants. The first thing to which the Committee on the annual estimates addresses itself in the Bahamas (to confine myself to a Colony of which I have had experience) is to eliminate or reduce a number of the items submitted by the Government, in order to make room for other items thought to be desired by their own constituents.

[1] See Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 5.

The Government is of course in no way responsible to the Assembly. No vote of censure on the part of the Assembly can displace the Governor or any of his officers. But the Assembly can, if it chooses, reject any of the Government's legislative proposals, amend them out of recognition or refuse supplies. The system of Government, which they embody, is in fact "representative Government", as distinguished from "responsible Government". Nor does the control of the popular representatives end with the voting of the supplies necessary for carrying on the administration. The supplies in the Bahamas are, to a considerable extent, not voted direct to the departments, but to Public Boards, whose members are indeed nominated by the Governor, but who by custom are very largely members of the House of Assembly. These Boards control the administration of Public Works, Public Health, Poor Relief, Hospitals and Education. Over the policy and expenditure of these Boards, when once he has appointed their members, the Governor has no control. Greatly as these Public Boards limit the scope of the Governor, they serve to effect that union of power with responsibility which is one of the standards of good Government. Moreover, greatly as the Governor is thus restricted, he is still the Governor, and his hands wield the whole administrative machine.

One would naturally enquire whether it is possible that such a system of Government should work. If it were not for the fact that the greater part of the members of these three Assemblies belong to a race reputed to have a peculiar genius for the art of Government, one might say with confidence that it could not work. As a matter of fact it does work, though no doubt at the cost of considerable intermittent friction. No one would think of displacing this form of Government in any of these three

Colonies, where it has been so long established, but equally no one would think of seeking to establish it anywhere else.

The *régime* is a sort of enforced partnership between the Governor and the Assembly, and it is necessary for the Governor to acquaint himself in advance with what are likely to be the views of his partners. For this purpose he is greatly assisted by his Executive Council, which, in the Colony of which I have more especially been speaking, always included three or more representative unofficial members of the Assembly. These Councillors not only keep the Governor informed of the current of public feeling and advise him on the impression that is likely to be produced by any measure under consideration, but also, in the absence of any *ex-officio* member of the Assembly, conduct the business of the Government therein, and take an active part in discussions, both in the House and in Select Committees.

In Barbados the system is at once mitigated and improved by the existence of an intermediate body known as the Executive Committee. This was the invention of the late Sir Conrad Reeves, at one time the Chief Justice of the Colony, and probably the most distinguished member of the African race whom the West Indies have produced. By the Executive Committee Act, 1891, it is the function of the Governor at the commencement of each session to appoint

> one member of the Legislative Council, and four members of the House of Assembly, not being already members of the Executive Council to be associated with and to form, together with the Governor in Executive Council, a Committee for the transaction of public financial business, for the consideration of ways and means, for advising with the Governor on any measure which the Executive may deem it expedient to bring before the Legislature, and for the conduct of public works, and the control and management of public institutions of the kind and in the manner hereinafter mentioned.

Through this Committee the members of the Assembly secured, in addition to those members who were already on the Executive Council, the association of four other representatives from their own ranks with the Executive of the Colony. The partnership between the Governor and the Assembly was thus broadened and made immensely more effective, and in return for this close association the Assembly relinquished its power of initiating money grants. Thus developed, the Barbados Constitution is surely one of the most interesting in our Empire. It has another special feature, which must also be mentioned, namely, that the House of Assembly elects the Colonial Treasurer.

This does not exhaust the constitutional law relating to settled Colonies. There is obviously a certain danger in a principle which allows irresponsible bodies of British settlers to establish themselves in all quarters of the world without imperial control, and with an automatic claim to representative institutions. Accordingly by a series of Acts commencing in 1843 and terminating with the British Settlement Act, 1887, power was given to the Crown in Council to legislate for such settlements and to establish Constitutions on more suitable and elastic lines than those permissible under the common law. The Constitutions of the Gambia, the Gold Coast and Sierra Leone have been established under these enactments.[1]

It is no doubt thanks to this legislation that the Colonial Office still retains control of the legislative situation in the Colony of Kenya.

[1] See Jenkyns, *op. cit.* p. 5, and Keith, *The Constitutional Administration and Laws of the Empire*, p. 268. The Act of 1887 extended to every British possession not acquired by cession or conquest, and not for the time being within the jurisdiction of the Legislature of any British possession.

COLONIES ACQUIRED BY CESSION OR CONQUEST

Let us now consider the position of Colonies acquired by cession or conquest. Here, subject to the wider overriding right of Parliament, the Crown has a free and unrestricted right of despotic legislation, exercised in practice by Orders of the King in Council. The Crown can in such possessions establish a Constitution on any lines it may consider expedient, and (subject to what is said hereafter) may at any time supplement local legislation by Orders in Council dealing with particular subjects. This local power of legislation by the King in Council, as distinguished from the superior or general power of legislation possessed by the King in Parliament throughout all places of his dominion, is sometimes referred to as the power of "subordinate legislation".[1]

So strong, however, was the force of British constitutional ideas that, notwithstanding this distinction between settled Colonies on the one hand and Colonies acquired by conquest or cession on the other, it was the early practice, where, as in the West Indies, some appreciable settlement followed the conquest or cession, to establish a bicameral constitution on the usual model. It was discovered, however, through the judgment of Lord Mansfield in the famous case of *Campbell* v. *Hall*, that by so doing the Crown abandons its power of local legislation. In the Colony of Grenada, after the grant of such a Constitution, the Crown had sought to disturb the fiscal system of the island by Order in Council. The Court declared that it had no power to do so.

[1] See Jenkyns, *op. cit.* p. 16: "Even the King in Council when legislating in that capacity for a Colony, is a local and subordinate legislature".

"We...think", said Lord Mansfield, "that by the two proclamations and by the Commission to Governor Melville, the King had immediately and irrecoverably guaranteed it to all, who were or should become inhabitants, or who had or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an Assembly with the consent of the Governor in Council in like manner as in the other islands belonging to the King."[1]

As a result of this judgment it became the practice for the Crown, when establishing Constitutions in territories acquired by conquest or cession, to reserve the right of subordinate legislation. Hence arose the rule under which in every modern Order in Council of a constitutional character a clause is carefully inserted reserving to the Crown the right to legislate for the Colony both for the amendment of the Order and for general purposes.

Meanwhile most of the West Indian Islands, whether acquired by conquest, like Jamaica, or settlement like Barbados, found themselves endowed with free legislative institutions. This circumstance had an important bearing on the struggle for the abolition of the slave trade and slavery. One of the lines of opposition to these measures was that the question ought to be left to the Councils and Assemblies of the colonists themselves. Restrictive measures, such as the registration of slaves, or administrative measures, such as the limitation of flogging, proposed by Canning in 1823, could be carried by Order in Council in Trinidad and Demerara (where the Crown had not parted with the power of legislation), but could only be recommended to the Councils and Assemblies of the other

[1] 1 Cowp. 208. A hundred years earlier the same principle had been invoked with regard to Jamaica and had been accepted by the Crown. See a recently published work of great interest, *The Constitutional Development of Jamaica*, by Miss Agnes M. Whitson (ch. IV).

islands, who promptly rejected them, and finally the abolition of both the slave trade and slavery itself was carried by Acts of Parliament over the heads of the Colonies affected.

THE WEST INDIES ABNEGATE THEIR CONSTITUTIONS

In little more than a generation after the abolition of slavery, an important change took place in the Colonies of the West Indies—which at that time, except for Ceylon, still formed the most important part of the countries directly subject to the Colonial Office. It became gradually recognised that these small island communities could not be effectively and prosperously administered under representative institutions, and that a stronger form of Government was necessary.

This was particularly felt in Jamaica as the result of the rebellion of 1865. In 1865 Dominica, in 1866 Jamaica, and at the same period one after another of the Leeward Island Legislatures surrendered their constitutional privileges to the Crown and reconstituted themselves. In the Windward Islands about the same time St Vincent was led to take the same course and other Colonies later followed suit.

The terms in which this change was carried out in the case of Jamaica may be of interest. An Act (29 Vict. c. 11) was passed "to amend the political constitution of this Island", declaring "that from and after the coming into operation of the Act the present Legislative Council and House of Assembly and all and every functions and privileges of these two bodies respectively shall cease and determine absolutely". And it was further enacted, by a supplementary Act (29 Vict. c. 24), that "in place of the Legislature abolished by the first section of the recited Act,

it shall be lawful for Her Majesty the Queen to create and constitute a Government for the Island, in such form and with such powers as to Her Majesty may best seem fitting and from time to time to alter and amend such Government". This Act was brought into operation by an Act of the Imperial Parliament which declared that the powers of the Crown should be exercised by Order in Council (29 and 30 Vict. c. 12).

The whole process was reviewed in an interesting and comprehensive despatch by the Duke of Buckingham and Chandos, the Colonial Secretary, dated August 17, 1868. He recited the fact that the movement had taken place without any solicitation on the part of the Home Government. "The object of all parties was to establish a system of Government and legislation by which the financial condition of the Colonies should be improved and their agricultural and commercial interests be promoted." This was secured by what we now know as the "official majority".

> The new Legislatures, whilst more or less differing from each other in their component parts have one feature in common, that the power of the Crown in the Legislature, if pressed to the extreme limit, would avail to overcome every resistance that could be made to it....

The Duke declared that Her Majesty's Government was not willing to accept this trust unless accompanied by such a measure of power and authority as would entitle them to perform effectively the duties which it was expected of them to undertake.

The principles thus worked out in the West Indies had necessarily an important bearing on the practice of the rest of the Empire, and it may, I take it, be assumed that out of this experience was evolved what is now the general model for our Crown Colonies, Protectorates and Mandated Territories—that is to say, a Legislature composed partly

of *ex officio* members, partly of nominated official members, partly of nominated unofficial members and partly of elected members, and so arranged that the Government, whether by the casting vote of the Governor, or without his casting vote, retains at its disposal on all questions a majority of the votes. It is by this means that in all places where this form of Constitution is established the Government maintains control of the finances, the processes of legislation and general administration—or in other words, it is by this means that the Government is able to govern. The official majority is in fact the very kernel and essence of Crown Colony Government.

The historic despatch of the Duke of Buckingham and Chandos to which we have referred passes in review the functions of all the above-mentioned classes of members as they were understood at that stage of constitutional development, and those who desire to pursue the subject in further detail should refer to that despatch.

This then is the ordinary form of Crown Colony Constitution. Let me repeat that the very kernel and essence of Crown Colony Government is the official majority. The effect of this official majority is that the Legislative Council is an advisory body. It enables the unofficial members, both publicly at full sittings of the Council, and in friendly conference on Select Committees, to press their point of view upon the Government, and it enables the Government at the same time to take its own decisions. Although the unofficial members are thus debarred from making their votes effective, it is not to be supposed that their views do not carry great weight. Their opinions are listened to with respect and differed from with reluctance. On occasions when it is discovered on a division that the opinion of the unofficial members of the Council is not with the Government, the opportunity is

sometimes taken for a further consideration of the matter by reference to a Select Committee. In the consideration of a Bill in Select Committee it is very seldom that the views of the unofficial members on practical details, if earnestly pressed, are ever ignored. On financial matters, and in particular on the consideration of the estimates, the greatest weight is attached to unofficial opinion. The essence of the institution is that in the last resort on every question, great or small, the Government retains the decision in its own hands.

CONSTITUTIONAL DEVELOPMENTS

Elected members—Communal representation

After the lapse of a generation from the date of the despatch of the Duke of Buckingham and Chandos, it was natural that in more quarters than one of the realm of the Colonial Office there should arise a desire for an extension of constitutional privileges. This desire appropriately took the form of a demand for an increase of the elective element or for the introduction of this element where it did not already exist. This was an obvious step in constitutional development.

The raising of this question, however, inevitably raises another—that of communal representation. What should be the basis of any electoral representation which might in any case be conceded? Should the representation be a representation of localities, or of communities?

Where the practice of nomination by the Governor was the rule it always seemed natural and appropriate that members should be nominated to represent communities. It is difficult to conceive of a Governor nominating members for localities (except, perhaps, in cases of separate islands). But when a country reaches a higher political stage, and

you introduce the principle of election, you are in a wholly different atmosphere. Communal representation means a communal electoral roll, and this is a thing which stirs the repugnance of political idealists.

The country where communal elections were first held was Cyprus. Here throughout the island were two separate communities—the Greeks and the Turks—differing altogether in race, in language, in religion, in domestic institutions, and in political loyalties and aspirations. It was impossible there to think of a composite local representation. Accordingly each of these communities in each administrative district of the island elected its own representative and the Legislature was so constituted that the official members and the Turkish members together exactly balanced the Greek members, the Governor retaining both an original and a casting vote. The Government was thus dependent upon the votes of the Turkish members.[1]

Certain other countries in which the question of communal representation arose comprised an Indian element in their population. These countries were naturally affected by the active discussion of the subject which had taken place in India. Thus in Kenya the Indian community, whose heart was set on a common electoral roll, rejected the proposition of a communal electoral franchise. To them a communal roll was anathema, a badge of racial inferiority. Accordingly this community is now represented in the Legislature (with one exception) solely by nominated members. In Trinidad, when the Constitution was re-

[1] This Constitution presents obvious points of criticism. It is surely a dubious proceeding for a Government to enlist the support of one community to enable it to outvote another, and to base the whole Constitution on such an arrangement. A constitution modelled on somewhat similar principles was proposed for Palestine, but never put into operation.

modelled in 1924, the idea of a communal representation of the Indian community was rejected. It was thought by the Under-Secretary of State, Mr Wood (now Lord Irwin), on the occasion of his visit in 1922[1] that the situation might best be met by retaining to a certain extent the system of nomination by the Crown so as to "secure representatives on the Council of races or important interests not otherwise adequately represented by direct election".

It is not possible in the time at my disposal adequately to discuss the principle of communal representation. One cannot lay down a general rule. So much must depend upon local circumstances. I should like to say this, however. *Prima facie*, I am in favour of communal representation. It has appeared to me that this principle has nowadays been the subject of quite unnecessary criticism, depreciation and reserve. Wherever there is an active communal consciousness, I have always thought that this form of representation is the only one which is in accord with reality. If people think and feel in communities, they should be represented in communities.

There is, however, another point of view, and you will find it best expressed in the Ceylon Report.[2]

> In surveying the situation in Ceylon, we have come unhesitatingly to the conclusion that communal representation is, as it were, a canker on the body politic, eating deeper and deeper into the vital energies of the people, breeding self-interest, suspicion and animosity, poisoning the new growth of political consciousness, and effectively preventing the development of a national or corporate spirit.

These are vigorous and searching words. I confess that, so far as Ceylon is concerned, I have been converted by

[1] Cmd. 1679, p. 27.

[2] *Ceylon, Report of the Special Commission on the Constitution*, 1928, Cmd. 3131, p. 39, see also pp. 31, 90, 99, 106.

the argument of the Report, not the least penetrating part of that surprising document.

On the other hand, read the arguments for and against communal representation set out in the East African Report[1], and it will be seen that, so far as Kenya is concerned, the balance is all the other way. Those in favour of communal representation are real, substantial, full of life and salt; those against it are airy, nebulous and theoretical.[2]

THE MODERN WEST INDIAN CONSTITUTIONS

Aspirations for an increase of constitutional privileges were naturally intensified by the crisis of the Great War. Everywhere the constitutional question came to the front. It may be convenient that we should first of all consider the history of this question in the West Indies. In 1921 Lord Irwin, then Parliamentary Under-Secretary of State for the Colonies, visited the West Indies in order to study on the spot the constitutional, economic and other questions which they presented. He very carefully examined the constitutional questions in the various islands which he visited, and his Report is a State Paper of historical significance.[3]

Following Lord Irwin's example we may intimate that in speaking of the West Indian Colonies we will confine

[1] Cmd. 3234 (1929), pp. 207–211.

[2] In the new Fiji Constitution, which came into operation on May 1, 1927, the representation is communal. See *The Times*, April 10, and November 6, 1929. The elements of the population (apart from the officials) are the European planters and traders, the Indian immigrants and the native Fijians.

The Indian community at first accepted the new constitution and three Indian members were duly elected. But on November 5, 1929, the Indian members demanded a common electoral roll for all British subjects, and, upon a resolution to this effect being rejected, resigned their seats.

[3] Cmd. 1679.

ourselves for convenience to Jamaica, the Leeward Islands, the Windward Islands and Trinidad. British Honduras is on a special footing. Barbados has a Constitution of its own which presents no immediate problems, and British Guiana is a case apart.

In the West Indian Colonies, so far had the process of depopularisation gone, that, with the exception of Jamaica, they were all administered under a system of pure Crown Colony Government, that is to say, the Legislature was composed of an official majority controlled by the Crown and an unofficial element nominated by the Governor. There were in fact no elected members.[1] Two demands were presented by various sections of the island communities. Firstly, it was urged that elected members should be substituted either wholly or in part for nominated members, and secondly, that where the unofficial members of the Council were unanimous in their opposition to Government proposals, these proposals should not be carried into effect.

With regard to the first of these demands, the question having been examined on the spot, action was taken in accordance with local circumstances. In some cases the demand was conceded, in others it was not judged to be in accordance with the local circumstances that this should be done. But speaking generally, the Legislatures of this group of Colonies have been reconstituted on the basis of the equality of the official and the unofficial elements, the Governor retaining the determining vote. The unofficial

[1] One does not expect to find comments on Colonial Constitutions in the pages of Gibbon, but the following sentence from the first volume of the *Decline and Fall of the Roman Empire* is too apposite not to be cited: "The principles of a free constitution are irrecoverably lost, when the legislative power is nominated by the executive".

element consists partly of nominated, partly of elected members according to local circumstances, but, wherever possible, a substantial elective element has been added to the various Legislatures.

With regard to the other question, namely, the overriding of a unanimous unofficial opinion by the official vote, it was explained in Lord Irwin's *Report*, p. 27, that "so long as the responsibility for the administration of the Colonies rested with the Secretary of State, it was essential that the Secretary of State should have this ultimate power in order to preserve the executive from being rendered impotent".

The only recommendation which he could make was that "in such circumstances the utmost consideration should be given to the views of unofficial members of Councils". With this object he advised that

> a general despatch should be sent to the Colonies concerned laying down that when there was such unanimous opposition on the part of all the unofficial members of Council, the Governor should refrain from bringing the contested measures into operation until further reference had been made to the Secretary of State. In cases of urgency, however, or when the Secretary of State had already given instructions in the matter and no new material was brought forward, the Governor should be empowered to take immediate action, but in these circumstances the matter should be at once reported to the Secretary of State for confirmation.[1]

It was observed that in such cases the dissentient minority would have the right of simultaneously forwarding

[1] Lord Irwin's recommendation was approved by the Secretary of State for the purpose of the Colony of Trinidad by Trinidad Despatch, No. 444, of October 27, 1922. The Secretary of State observed: "It is to be clearly understood that the arrangement which I have approved applies only to Government Bills and financial resolutions and that it does not apply to Ordinances varying existing taxes or imposing new taxes". A similar approval was conveyed to the other West Indian Colonies.

to the Secretary of State through the Governor a statement of their views, but that financial matters, such as taxation ordinances, must always be treated as urgent where there is any possibility of evasion by delay.

Thus the situation remained in essence the same. The Crown controls the Legislatures.

It remains to consider the special cases of Jamaica and British Guiana and thence to pass to constitutional developments in the Far East, and in Tropical Africa.

THE OFFICIAL MAJORITY

It may be well, however, at this point to give a little further consideration to a question which in every case insistently obtrudes itself—that of the "official majority". As we have already more than once observed—it is the essence of Crown Colony Government. It is an institution that it is very easy to decry and depreciate. But it must be remembered that at certain stages of development people require to be governed much more than they require to be represented. Whatever may be said, this institution does secure—at any rate where the unofficials include elected members—that all public questions shall be freely and openly ventilated, that the Government shall be publicly and directly criticised and attacked, and shall be required to give an account of its policy and to defend itself.

Nevertheless, it has an invidious air. The sight of a long row of officials, who otherwise scarcely open their lips, exclaiming "Yes" or "No" in succession, by official order, whatever their private opinions may happen to be—moves the resentment of politically minded spectators. The officials themselves have little love for this mechanical process. Everywhere, wherever political consciousness has developed, it is challenged and required to justify its

existence. But if this instrument is taken out of the hands of a Colonial Government, the Government cannot effectively govern, unless it can find some expedient to take its place.

The history of this question, therefore, wherever political consciousness has been aroused, has been a history of attempts to qualify or mitigate the invidiousness of the official majority, or of attempts to devise a substitute.[1] Thus in Jamaica there was devised a peculiar form of unofficial veto. Later it was attempted to replace this veto by the expedient of an Executive Committee (derived from Barbados). Sacrifice your official majority, it was suggested; get a sufficient number of your unofficials discussing things round a table with your officials, and they will in most cases come to a common conclusion, and when these unofficials come to discuss it later in full Council, they will be as good as officials. The same idea, in another form, has been put into effect in British Guiana. In Ceylon, however, it was universally felt that the country was entitled to a generous measure of enfranchisement. With a confidence, which now excites one's surprise, the official majority was sacrificed without qualification. What this step meant was at the time not realised. But it soon became apparent. The end of Crown Colony Government was in sight.[2]

But let us now deal with Jamaica and British Guiana.

[1] See an admirable article in *The Times*, April 10, 1929, on "Crown Colony Government": "It cannot be claimed that any perfect arrangement has yet been found....But it is at least becoming more and more clearly recognised that our Colonial Empire needs a wider range of Governmental forms, new combinations and many inventions in the constitutional field".

[2] In the latest revised Constitution—that of Fiji—the official majority has been retained, and the representation is on a communal basis. See p. 172, *supra*.

THE JAMAICA CONSTITUTION

The Constitution of Jamaica is the most singular Constitution that has ever existed in the British Empire, except perhaps the recently abolished Constitution of British Guiana. When Jamaica renounced its old Constitution in 1865 the elective principle was discarded altogether, and the Legislative Council consisted solely of official and nominated members. In 1884 the elective principle was reintroduced by an Order in Council[1] directing that nine members should be elected by popular vote. Now comes the extraordinary feature of the constitutional story of Jamaica. This Order in Council contained a provision under which six of these nine elected members were entitled to veto "any law, vote or resolution imposing any tax or disposing of or charging any part of the public revenue". Under a further provision the nine elected members, acting unanimously, were entitled to veto any proposition whatever. By an amending Order in Council of October 3, 1895, the number of elected members was raised from nine to fourteen. There were similar provisions as to the veto of the elected members. Any nine could veto any financial proposition. The unanimous vote of the elected members could veto any proposition whatever. It was provided in these Orders in Council that "the votes of the elected members shall be taken before the votes of the *ex officio* and nominated members". It could thus be determined in advance whether any proposition, financial or otherwise, was or was not to be vetoed. An escape from this situation was, however, provided. The Governor could declare that the question was "of paramount importance to the public interest", and the votes of the elected members could

[1] Order in Council of May 19, 1884.

thereupon be overridden by the votes of the official and nominated members.[1]

The peculiarity of this Constitution lies in the power which it gives to an unknown nine out of fourteen members to veto any financial proposition of the Government. It is an illogical veto which can be overriden by an exceptional power. This power of the Governor, to override the vote of elected members by a declaration that the question involved is of paramount importance to the public interest, is of great constitutional significance because the precedent has been in principle followed in the Constitution of India. It has since been adopted in the Constitutions of Ceylon and British Guiana, and has been proposed for adoption in the Constitution of Kenya.

On the occasion of Lord Irwin's visit to the West Indies he found in Jamaica, as elsewhere, that the constitutional question was the subject of very active discussion and as a result of his enquiries he recommended a new system. The principal feature of this proposed new Constitution was the adoption from Barbados of the idea of an Executive Committee. This Committee was to be an intermediate body between the Legislative Council and the Executive

[1] The arrangement will be best appreciated by reference to the actual terms of Article 9 of the Order in Council of 1895.

"The votes of the *ex officio* and nominated members shall not be recorded against the unanimous votes of all the fourteen elected members on any question unless the Governor shall have declared his opinion that the decision of such question in a sense contrary to the votes of the elected members is of paramount importance to the public interest."

It was always understood that the nominated unofficial members were under an obligation to give a general support to the Government, but this obligation has been questioned in the discussions of recent years.

The Council now consists of the Governor (with a casting vote), ten officials (five *ex officio* and five nominated), five nominated unofficial members and fourteen elected members.

Council (or as it is known in Jamaica the "Privy Council"). This intermediate body was to be evenly balanced. The official and unofficial elements were to be equal. It was to consist of the Governor, five official members, two persons selected by the Governor from the nominated members of the Legislative Council, and four to be selected by the Governor out of a panel of seven elected by the elected members of the Legislative Council. This Committee was to be an advisory body to which all financial matters and all projected legislation would be referred for advice.

The Legislative Council was to consist of the Governor, five official members (three *ex officio*, two nominated), five nominated unofficial members (free to vote as they pleased) and fourteen elected members. There would thus be an unofficial majority of nineteen to six. If, however, all the members of the Executive Committee voted with the Government on any Government proposition which had been referred to the Committee for advice, the Government could rely on twelve votes against a possible thirteen. If therefore the Government could convince one of the nominated members in addition to those on the Executive Committee, it could carry its proposition. The vetos of the nine and the fourteen were to disappear.

The Governor was to retain his "reserve power", but it was to be defined on somewhat wider lines. It was to apply to all propositions which he should be of opinion were "essential to the good Government of the Colony", but only to be exercised "when a serious issue or an important question of principle was at stake".

The merit of this proposition was that it associated four out of the fourteen elected members with the responsibilities of Government. As things stand at present, the fourteen elected members have developed a very active power of criticism, but have no executive responsibility.

Unfortunately, after prolonged discussion, this new Constitution was rejected by the Legislative Council and Jamaica maintains the *status quo*.[1] The members knew where they stood under the old familiar system. They did not know what would happen under the new.

THE BRITISH GUIANA CONSTITUTION

The recently abolished British Guiana Constitution was more singular than even that of Jamaica. Here there were two legislative bodies, the Court of Policy and the Combined Court. The Court of Policy consisted of the Governor, seven officials and eight elected unofficial members. The Combined Court consisted of the Court of Policy with six additional elected members known as "financial representatives". The Combined Court had the power of imposing taxes and in practice the right to control the appropriation of public monies. On all financial questions the Government was thus in a permanent minority.[2] On

[1] The understanding under which the nominated unofficial members were bound to support the Government was so generally repudiated in the previous discussions that it is presumed that they are now free to vote according to their own views. If this is so the Government is in a permanent minority in the Legislative Council, and cannot override the vote of the majority even on questions of paramount importance.

[2] The financial procedure was a peculiar one. Of the annual revenue 83 per cent. was collected under two Ordinances—the Customs Duties Ordinance and the Tax Ordinance, which were passed by the Combined Court annually. The Combined Court (consisting of fourteen elected members, seven officials and the Governor in the chair) first passed the annual estimates. The Governor then left the chair. The Court resolved itself into a Committee of Ways and Means, and proceeded to consider the Government proposals for meeting the sanctioned expenditure. See *Report of the British Guiana Commission* (Cmd. 2841), p. 12. The Combined Court could not itself initiate money grants. See Lord Irwin's *Report* (Cmd. 1679), p. 90.

all other questions by virtue of the Governor's casting vote it had a bare majority, but its action on these questions could be vetoed by the elected members, for, if seven of these members abstained from attendance, the necessary quorum for the despatch of business could not be secured.

There were other incidental defects in the system. There was no link between the Executive and the Legislature. There were no elected members of the Legislative Council on the Executive Council, and there were no nominated members in the Legislature. European agricultural and commercial interests were thus unrepresented. The constituencies were of unequal size and general bribery and treating were admitted to be rife.

This Constitution, which had never worked satisfactorily, was plainly an indefensible one, or would be thought so, if it had not so long been defended. It owed its existence, not to any intelligible political principle, but to historical accident. British Guiana was conquered from the Dutch. Under the old Dutch Constitution the local planters had equal representation with the officials of the Dutch West India Company. Shortly before the Colony was first occupied by the British in 1796, the planters, taking advantage of the state of confusion which existed, secured the additional financial representation which was maintained in the Combined Court and this arrangement was guaranteed by the terms of the final capitulation of 1803.

British Guiana has a large undeveloped territory, and it was at the present juncture considered impossible to secure for it the necessary financial development under such a Constitution. It was a Constitution under which the Government has never been able to govern. A Parliamentary Commission was appointed in 1926 to "consider and report on the economic condition of the Colony, the causes which have hitherto retarded and the measures

which could be taken to promote development". This Commission reported that

> in the present state of political, economic and cultural development, it is not merely desirable but essential that the authorities finally responsible for the Government of the Colony should have power in the last resort to carry into effect measures which they consider essential for its well-being.

In pursuance of a recommendation of this Commission[1] a local Commission was appointed to consider what constitutional changes should be adopted so as "to confer power upon the Governor to carry into effect measures which he and the Secretary of State consider essential to the well-being of the Colony". And the Commission so appointed put forward a scheme, which was promptly carried into law.[2] This was the first time in history that the Colonial Office has itself assumed responsibility, and without local consent has deliberately abolished long-cherished but indefensible privileges by an Act of the Imperial Parliament.

Briefly stated, the recommendations of the Commission, now embodied in law, were as follows:

A single legislative body was to be created for all purposes, composed as follows:

Officials	10
Nominated unofficials ...	5
Elected members	14
Total	29

There was to be an Executive Council, constituted as follows:

Officials (including the Governor)	6
Unofficials	5
Total	11

[1] For the *Report* of this Commission see Cmd. 2841.

[2] *Report of the British Guiana Commission* (1927), Cmd. 2985. The British Guiana Act, 1928; the British Guiana (Constitution) Order in Council, 1928.

All the unofficial executive councillors were to be members of the Legislative Council—three being chosen from the elected members and two from the nominated members—but it was recommended that this proportion need not be strictly adhered to. The Governor has thus upon his Executive Council five unofficial members of the Legislature and commands their votes in that body. These five votes give him a majority of one in the Legislative Council.

The Commission nevertheless recommended that, for the purpose of removing any deadlock which might arise in any emergency, the Governor should have power to reserve for his own decision any matter which he and the Secretary of State might consider essential to the good Government of the Colony, and they submitted a formula for this purpose. They proposed that the necessary action should be taken by a certificate under the hand of the Governor and not by excluding the votes of the elected members[1]. Effect was not to be given to any such decision (except in cases of urgency) until the matter had been submitted to the Secretary of State.

This Constitution is the latest (or nearly the latest) creation of the Colonial Office and from the point of view of effective Government it is the best. It gives the Governor complete control of all the processes of legislation and administration. At the same time it gives adequate recognition to the elective principle. There is no "official majority" in the strict sense of the word. The officials are ten—the unofficials nineteen. There is a *Government*

[1] The formula adopted in the Order in Council of 1928 (s. 62) required that the Governor should declare "such decision to be in his opinion necessary in the interests of public order, public faith, or other first essentials of good government, including the responsibilities of the Colony, as a component part of the British Empire". The decision is to be made by the Governor in Executive Council.

majority—secured by the addition of five unofficial members to the Executive Council—and, of these five, three will be ordinarily drawn from the elected members. These elected members quite rightly and soundly retain their seats in the Legislative Council.[1] There are thus all the materials for an effective partnership—the predominant partner being the Governor.

II. THE FAR EAST

CEYLON

We now come to a country which has produced the most enterprising and interesting of all attempts at Constitution-making—Ceylon, the pride of the Colonial Service, the most beautiful country in the world, the home of the most picturesque and individual of historic communities.

It is not possible—save in the briefest and most inadequate manner—to narrate its political history. Originally all the unofficial seats were filled by nomination of the Governor and there was an official majority. Everything was then officially for the best in the best of all official worlds.

There was an intermediate stage when in the year 1911 the elective principle was introduced in the most tentative and partial degree. Three communities were accorded elective representation—the Europeans, the interesting and

[1] The Commissioners pressed for this with emphasis: "We go further and strongly recommend that all members of the Executive Council should be members of the Legislative Council". Strange to say the tendency elsewhere on this point has been in the opposite direction. In the Ceylon Constitution an elected member on being appointed to the Executive Council had in practice to resign his seat, and the same principle received the approval of Lord Irwin in his report on the West Indian Constitutions. See Cmd. 1679, p. 10.

distinguished community known as the Burghers, and a purely imaginary community known as the "Educated Ceylonese".[1]

After the war the constitutional question arose afresh. Great promises had been made to India. It was felt that Ceylon was entitled to at least equal recognition. On what basis, then, was this recognition to be accorded?

Admirable as, from a Government point of view, are some of the conveniences of an official majority, there arrives sometimes among Colonial populations a stage of political consciousness at which public opinion simply will not tolerate the idea. Ceylon had reached this stage. Its leaders frankly proclaimed that if a Constitution were offered them which embodied an official majority, they would take no interest in it.

We quite understand, it was said, that we are not ripe for self-government. We realise that the Governor must have power to make such orders as are necessary for the exercise of his responsibilities. But if he wants to make an order, let him make it himself, and not call upon a row of twelve or more officials to make it for him by voting "Aye" or "No" at the word of command in the Legislative Council. Let him be armed with the power of certification and we shall be content.

The Government succumbed to this plausible reasoning, and, after yet another temporary Constitution—"a tran-

[1] This constituency, based on a not very distinguished intellectual qualification, numbered about 2000. The theory of its existence was that persons who had received a "European education" were thereby in a sense denationalised and rendered incapable of representing their fellow-countrymen. They were therefore to be represented as a special class. This constituency deserves to be remembered as one of the curiosities of political history. It lasted from 1911 to 1923.

sient and embarrassed phantom"—had flitted across the stage, it created the Constitution of 1924. This Constitution had three distinguishing features:

(1) It comprised a Legislative Council with a sweeping unofficial majority. The total number was forty-nine. There were twelve official and three nominated unofficial members. The remaining thirty-four were all elective or were ultimately to become so.

(2) It carried the communal principle to its farthest possible extreme. It established communal representation for urban Europeans, rural Europeans, Burghers, Mohammedans, Indian merchants, Indian immigrant labourers, and even for the Tamils of the principal Singhalese province: out of the thirty-four elective constituencies eleven were communal.

(3) The Governor was armed with a power of certification, under which he was authorised to carry any proposition which he declared to be of paramount importance by the votes of the official members.

There is a fourth feature which deserves to be noted. The Executive Council was re-organised and now comprised four unofficial members—but, strangely enough, it was not considered proper that an elected member of the Legislative Council who was appointed to the Executive Council should retain his elective seat. This is an idea now generally repudiated as gratuitous and unsound. See p. 184 above.

Such was the new Constitution of Ceylon. A great and far-reaching change had been effected. A resolution of the Legislative Council now for the first time expressed the view of the whole electorate of the country. When the Legislature declared itself on such questions as the site of the new national university, or the discontinuance of the policy of rubber restriction, such an expression of

opinion was bound to be regarded with respect. It was obvious that there had been a profound modification of the public life of the country. Ceylon had passed into a new political stage.

But it was not merely in the passage of resolutions that the powers of the new Legislature were exhibited. It had practically unrestricted control of legislation, and of public finance. It is true that the Governor had his power of certification—but it at once became evident that this was only a most occasional and always a most invidious weapon. Let this be clearly understood—*A power of certification is no substitute for an official majority*. Every time it is exercised it provokes indignant protests, even from persons of moderate temperament, and these become more and more intense as time goes on. It was a symbol of the new *régime* that (except on special occasions) the Governor no longer occupied the chair. This was appropriate enough. It would not have been in accord with his position that he should sit there to see himself at any moment overruled by those over whom he presided.

It soon became clear that this Constitution was entirely unsound.[1] The members had the fullest possible power to control and thwart the Executive, but they had no executive responsibility. Unofficial majorities had existed in Indian Legislatures since 1909, but their powers had been restricted. Since 1920 there had been a division of spheres under the Dyarchy, but the power of the purse had always been retained. But in Ceylon the powers, legislative and financial, accorded to the Legislature were unrestricted, save for the Governor's powers of veto and certification.

[1] In the opinion of the Governor, the picture presented in the next two paragraphs (taken from the Report of the Commission) was overdrawn and the descriptions of the Report were too sweeping. See Cmd. 3419, pp. 7, 13.

There was no more friendly and co-operative atmosphere than that of the public life of Ceylon, and it was assumed that the Executive and the Legislature would work in partnership. But the inevitable course of events appears to have converted the Legislature into a permanent opposition. The possession of power in such situations irresistibly leads on to its use. The members have developed an intense interest in administrative details. By means of the Finance Committee and the appointment of Select Committees (no less than fifty-five of which were in being at the time of the visit of the recent Commission), they have submitted the officers of the Executive to a rigorous and searching criticism. These officers are said to have been cross-examined like hostile witnesses, and to have little relished the experience. The members of the Legislature have thrown themselves with ardour and enthusiasm into the task of mastering the whole machinery of administration, and have apparently found the subject of administration far more interesting than that of legislation. The multiplication of Select Committees has slowed down the machinery of Government and paralysed its legitimate activities. The new Constitution had reduced the Government to impotence without providing means for training the unofficial members in executive responsibility.

Hence came the Commission of 1928 and its ingenious and original Report. Confronted with the question whether to go backward or forward, the Commission decided that Ceylon must go forward on the path on which it had started, and propounded a new Constitution the like of which has never been seen in the Colonial Service.

Moved by the interest shown by Select Committees in administration, the Commission proposes to hand over the control of all administration to Standing Committees. The

whole Legislature, greatly enlarged, is to be divided into seven Committees of some ten members each. Every member is to be assigned to one and not more than one of them. On these Committees is to be conferred the oversight of the great bulk of the Government departments. The Chairmen of these Committees (together with the last remnant of the old official hierarchy—a Chief Secretary, an Attorney General and a Treasurer—now transformed into "Officers of State"), are to become a "Board of Ministers" presided over by the Chief Secretary. The Legislature itself is to be transformed into a State Council, and to sit sometimes in Executive Session, and sometimes in Legislative Session.

As to the ministers, the three "Officers of State" are merely advisers and have no votes. The other ministers have no collective responsibility, except for the Budget and the Estimates. They meet together under the presidency of the Chief Secretary, for this purpose and for this purpose only.

One asks oneself—where under this situation does the Government of the island reside? Not in the Governor. Not in the Board of Ministers. There is no Prime Minister. There is indeed a Vice-Chairman of the Board of Ministers who is to be the Leader of the State Council and the parliamentary mouthpiece of the Government—but he has no control over his colleagues. Nor can it be said that the Government is in Commission—distributed among the Chairmen of the several Committees. These Committees decide by a majority vote, and a Chairman may have to issue orders and put forward proposals with which he personally disagrees. The Governorship is thus distributed among the several Committees considered collectively.[1]

[1] Theoretically, no doubt, the whole Council has the supreme power by virtue of its right to reject or "refer back" reports of

These are only a part of the changes recommended by this adventurous report.[1] Under its scheme, as we have noted elsewhere, the ordinary machinery of Colonial Office Government will cease to exist. The Governor "will no longer be responsible for the administration of the Island" (p. 78). He will not have a Colonial Secretary. He will sit apart with a Private Secretariat of his own, exercising from time to time a power of veto or suspension,[2] and not otherwise emerging into public affairs.[3] The Colony will no longer have a Colonial Secretary in whom administration is concentrated, but only a Chief Secretary, whose functions will be those of a "political adviser" and who will be in charge of a few miscellaneous departments of his own. The Attorney General will no longer draft legislation—that is to be transferred to an officer in the department of the Chief Secretary. To compensate him for the loss of one of his most essential functions, he will be charged with the conduct of the elections—surely, a proposal which requires explanation.

The picture is certainly an unfamiliar one, but the design is bold and original. Originality in the sphere of political

Committees. But the Governor himself has a similar power. These powers would be exercised only occasionally. The real governing bodies would be the Committees.

[1] Another of its most important proposals was the institution of manhood suffrage. It is singular and characteristic that while one Commission was recommending its institution in Ceylon, another was recommending its abolition in East Africa. It also recommends woman suffrage for women over thirty.

[2] He has an absolute and unlimited power of veto, but in practice will ordinarily use it within certain defined categories.

[3] He may, if necessity arises, declare a state of emergency, and take over the control of the police or any other department or service, which he may consider it to be in the public interest that he should direct.

construction is sometimes viewed with suspicion. Constitutions, one feels, ought to be evolved, not spun from the brain.

But nevertheless it may prove that this Report is a work of insight and genius. Its boldness consists in its selection of the Standing Committee of the Legislature as the main instrument of Government. In so doing it is simply adopting the procedure of the English Town and County Councils, and applying it, both for administrative and legislative purposes, to a Colony half the size of England. When the London County Council was established, one of the first questions it had to decide was whether it would work by party Government, or by Committee Government, and it chose the latter. It may be that in Ceylon there was no alternative. Party Government was impossible. The only alternative suggested—and indeed approved by the Legislative Council—was that of a Board of Elected Ministers. Such an expression of local opinion must be viewed with respect, but it may well be doubted whether a firm Government could be established on so purely personal a basis.

Certainly there is much to be said for Committees. They divide the burden of responsibility, they secure continuity, they enable mind to conspire with mind, they are an unrivalled means of political education. But the question is—are they sufficiently commanding and authoritative for the Government of a country with the historic traditions of Ceylon? It remains to be seen.

In my own humble opinion the proposed Constitution would work better if the legislature were less numerous, if the Committees were smaller, if the Board of Ministers were a real Cabinet; and if the Governor himself presided. His personal ascendancy is feared. But an ascendancy that cannot command a vote need surely excite no alarm.

Further, like most people, I am perturbed by the proposed coolie franchise.[1]

THE STRAITS SETTLEMENTS AND THE FEDERATED MALAY STATES

Let us now pass to a neighbouring but very different atmosphere. By a resolution of October 13, 1920, a Select Committee was appointed to consider the constitution of the Legislative Council of the Straits Settlements. It was a very representative Committee, and it gave the question a very full consideration. Its Report referred to the unreality which attaches to debates held under the shadow of an official majority, but pointed out that it was not realised that the real work of the nominated members was done in their capacity of unofficial advisers to Government. While a general air of dissatisfaction with the existing system seems to pervade the Report, the members of the Committee did not find themselves able, in local circumstances, to recommend the introduction of the principle of popular election. The only extent to which they went in this direction was a recommendation that two European members should be elected by the Chambers of Commerce of Singapore and Penang. They nevertheless were of opinion that the situation would be improved if an unofficial were substituted for an official majority. They therefore recommended that the Council should consist of twelve official and fourteen unofficial members.

The result would have been, in the unlikely event of all the unofficial members combining against the Government,

[1] For further developments of the constitutional question in Ceylon, which took place while these pages were passing through the press and consequently could not be included in the text, see "Note on the constitutional question in Ceylon" in the pages immediately succeeding the Preface.

that the considered view of the Government would be overruled by those whom (according to the view of the Commission) it had appointed as its own unofficial advisers. To provide for such a contingency the Committee recommended that the Governor should have a reserve power to make his view effective on the same terms as those adopted in Ceylon. It is perhaps not surprising that the Government did not see its way to accept these half-hearted recommendations. The decision of the Secretary of State, embodied in the Royal Instructions of August 18, 1924, was that the Council should consist of twenty-four members, twelve official and twelve unofficial members, with the Governor in the chair. This involved the appointment of additional Chinese, Eurasian, Indian and Malay members. Two members, as suggested by the Select Committee, are nominated by the Chambers of Commerce of Singapore and Penang. Otherwise there was no change and the Council contentedly continued under its official majority.

Further, in the Federated Malay States the Constitution has been the subject of revision. The Legislative Council there consisted of four Sovereign Princes ruling under the protection of the British Government, the four Residents of the four States, a certain number of official and unofficial members nominated by the High Commissioner, the Chief Secretary to the Government and the High Commissioner himself in the chair. It was certainly a peculiarly constituted body. The story of its reconstitution will be told in a subsequent chapter, but it may be sufficient to note here that, as in the Straits Settlements, there was no demand for the introduction of popular election and that all parties are content to proceed with a Constitution based upon the continuous control of the High Commissioner.

III. TROPICAL AFRICA

Let us next pass to Tropical Africa, and there confine ourselves to two quarters—the West and the East.

West Africa and East Africa are two great regions of the Empire that present perpetual contrasts. The most prominent feature of our realm in West Africa is that it is divided up into four separate and detached areas—Nigeria, the Gold Coast, Sierra Leone, and the Gambia—each comprising a central nucleus, the old Colony, and, clustered around this nucleus, a larger and more primitive area, the Protectorate, or other special Territory. The Legislative Council in all cases has an official majority. All interests are represented—both European and African. In the Gold Coast the unofficial element (which comprises six African Chiefs, elected by their Provincial Councils) is predominantly African.

In the Gold Coast, the Council legislates for the Colony alone. In the Gambia and in Sierra Leone the Council is a composite Council and legislates for both the Colony and the Protectorate. In Nigeria the system in force is a peculiar one. The Governor of Nigeria is certainly the most singular legislative personage in the Empire. For the purpose of the original Colony of Lagos and the extensive Southern Provinces of the Protectorate, he sits in the chair of the Legislative Council and presides over the passing of laws through all the processes of three readings and Committee. For the purpose of the still more extensive Northern Provinces he enacts laws by the autocratic act of a publication in the *Gazette*. He consults his Executive Council, but this Council is not associated with him in his legislative act. If, as often happens, he adopts in one

capacity what he has elaborated in another, his assenting formula is:

> Assented to in His Majesty's name in so far as the provisions hereof relate to the Colony and the Southern Provinces of the Protectorate, and enacted by me so far as the provisions hereof relate to the Northern Provinces of the Protectorate.

Another essential feature of British West Africa is that though there is considerable industrial development, there is no appreciable European settlement, and the Government is consequently freed from the problems which that settlement involves.

British East Africa is in complete contrast to all this. It is one great continuous area—fourteen times the size of England, comprising a Protectorate (Uganda), a Colony (Kenya) and a Mandated Territory (Tanganyika). It has no nuclei with annexed Protectorates.[1] It has an appreciable—though sometimes overestimated—European settlement, and, what is more, a numerous Indian settlement. In its principal Legislature, therefore—that of Kenya—it presents special problems and a very special atmosphere. In West Africa the African cultivator and the African native ruler hold the centre of the stage. In East Africa that place is assumed by the 2000 settlers of Kenya. Everyone in Tropical Africa is familiar with this contrast of the West and the East.

The ideal of the settlers of Kenya is "self-government" —but the phrase is here used in a special sense and means

[1] Zanzibar was such an annexed Protectorate, but is so no longer, having been restored to administrative independence in 1925. See *East African Report*, 1929, Cmd. 3234, p. 228. (For convenience the *Report of the Commission on Closer Union of the Dependencies in Eastern and Central Africa* is thus briefly designated throughout this chapter.)

"Government of the native and Indian races by the British Settlers."[1]

The Legislative Council of Kenya under the Royal Instructions of 1927 is so constituted as to give the Government control of the situation. There is an official majority. The Government seats are twenty; the European eleven and the Indian five. There is an unofficial Arab member, and in addition there is a nominated unofficial who represents the interests of the African community, and who is in practice a missionary. The European members, one Indian member and the unofficial Arab member are elected. (See *East African Report*, 1929, Cmd. 3234, p. 183. As to the Indian members see p. 170, *supra*.)

This is the situation in theory, but in practice the European settlers, by virtue of their racial status and their personal qualities, exercise more than their constitutional power. Even those of them who sit on the Executive Council do not consider themselves bound to support the Government by their votes in the Legislative Council, and this position is apparently accepted by the Government.[2]

The East African Report recommended three changes:

(1) The addition of four further persons (who for the present must be Europeans) as representatives of native African interests—making five in all.

(2) The abandonment of the official majority—and the substitution of a carefully devised balance under which the Government votes, taken in conjunction with the votes of any one of the principal communities, would override the votes of all the others. Thus neither the Europeans,

[1] Or, to put it less invidiously, the exercise of the same racial predominance as obtains in the "self-governing" Dominion of South Africa.

[2] See *East African Report*, 1929, Cmd. 3234, pp. 89, 184, 197, 199.

nor the Indians nor the native Africans could suffer anything which they conceived to be detrimental to their interests unless it was imposed upon them by the votes of the Government supported by at least one of the other communities. A combination of any of the three racial groups with the Government will command a majority.

(3) Theoretically under this scheme all the unofficial communities could combine against the Government and reject any of its measures. In practice such a thing could never happen. But to meet the possibility, the Report proposes a power of certification and overruling legislation. This power, however, is to reside not in the Governor of Kenya, but in a new official, the Governor General, or High Commissioner, who is to be charged with the duty of enforcing a common native policy in all the three countries of East Africa, and the co-ordination and combination, so far as possible, of certain of their administrative services. (See pp. 28–29, *supra*.)

Such in briefest outline are the proposals of this admirable and epoch-making State paper.[1]

IV. DURBARS AND ADVISORY COUNCILS

Both in Nigeria and the Federated Malay States, there is a form of Consultative Council (whose original home was the East), namely a Durbar, which meets yearly for a brief

[1] These proposals were considered in a critical and destructive report by Sir Samuel Wilson, who was sent on a special mission to East Africa to enquire into the manner in which they had been received by local public opinion, and to seek a common basis of agreement. See Cmd. 3378 (Sept. 1929). He rejects the balance of power proposed by the Commission, and submits alternative schemes, under which the elected Europeans and the nominated unofficials, voting together, would control the Council. He reports that there is no support in East Africa for the proposal that a Governor General should enforce a common native policy. (See note on p. 203, *subter*.)

period and at which a number of important personages assemble to meet the Governor to hear his views on the general situation of the country, and to discuss under his Presidency the most important questions and developments of the time.

In Nigeria the official members of the Durbar include all the Executive Councillors, the Residents of the Provinces and certain other important officials. The unofficial members comprise six European representatives of commercial interests and six of the leading Paramount Chiefs (see *Report on Amalgamation of North and South Nigeria*, Cmd. 468, para. 41). Lord Lugard notes that in the year of that *Report* the Sultan of Sokoto announced his intention of being present although this involved a journey by road and rail of one thousand miles. In the Federated Malay States, by means of a Durbar of this nature, the rulers of the four States meet the High Commissioner, the Chief Secretary and the Residents of their States under conditions more appropriate to their position than membership of a Legislative Council. In certain stages of civilization Durbars of this nature are probably the most natural and effective form of Council.

ADVISORY COUNCILS

Out of these Durbars there has been evolved an idea which is a further extension of the same principle—that of the Advisory Council—working side by side with the Legislative Council, or in spheres outside its jurisdiction, with different powers and different procedure—at once more free, more elastic and less responsible. These regions are too large, it is said, to be compassed by a Legislative Council. Let us go to the spot and find out informally what the chiefs and people think and want. The Council is to embrace representatives of all interests and is to

afford them an opportunity of expressing their views on all matters of policy—administrative as well as legislative—affecting those interests. It is to meet at various seasons and places in our vast Protectorates, as occasion may require, under the presidency of the Governor or some high official. In particular it is to comprise Paramount Chiefs, and it is thought that these Chiefs, familiar with the idea of their own tribal council, will gradually accustom themselves to a conception foreign to native thought—that of a composite Council—and that they will come to appreciate the privilege of having a voice in the larger affairs of the country.

The idea originated with Lord Lugard,[1] who has proved to be the inspirer of many of the proposals of the East African "Closer Union" Commission, and it fills a prominent place in their Report.[2]

It is, perhaps, in this connection that we may best refer to the native institutions of Basutoland. Here, until 1903, there existed a "Pitso" or National Assembly, which reminded Lord Bryce of the Agora, the assembly of freemen described in the Homeric poems. At this annual gathering all Basuto men enjoyed the rights of attendance and free utterance. It was a principle of the customary law of the Basuto that no man might suffer in consequence of anything he said in the Assembly.

In 1903 an Advisory Council was established, the members, about a hundred in number, being in part selected by the Chiefs and in part nominated by the British Government. This Council discusses the expenditure of money raised by taxation, ventilates opinions and grievances, or considers legislative proposals which with

[1] See *Representative Forms of Government and Indirect Rule in British Africa*, pp. 15, 47–9.

[2] See pp. 80–1, 188–9, 202, 239, 240–1, etc.

the High Commissioner's sanction may become laws. The Pitso is now only summoned on very special occasions, such as when the Prince of Wales visited Basutoland.[1]

V. COUNCILS OF CHIEFS

In our study of the subject of Indirect Government it was observed that its principles have three aspects: administrative, judicial and legislative. It remains now to consider its third and legislative aspect. In various places a power of subordinate legislation has been conceded to Councils of Chiefs for the purpose of matters affecting their own communities. Thus in the Gold Coast, under the Native Administrative Ordinance 1927, provision is made for the election of both Paramount Chiefs, and Divisional Chiefs, and the Paramount Chiefs so elected, with the concurrence of minor chiefs and authorities or a majority of them, may, subject to the approval of the Governor, make by-laws for the good government and welfare of the natives belonging to the jurisdiction of the Paramount Chiefs. Similarly, in Sierra Leone, under the Protectorate Native Law of 1905, Assemblies of Paramount Chiefs are authorised to advise the Governor and, subject to his approval, to pass any law for the welfare of the race and territory represented by the Chiefs constituting such Assemblies. Both in Nigeria and in Tanganyika the native authorities, which may include Councils or groups of Chiefs, may be authorised to make rules to be obeyed by natives within the local limits of their jurisdiction, providing for the peace, good order and welfare of such natives. (See in the case of Tanganyika, the Native Authority Ordinance,

[1] The above account is derived from *The Golden Stool* by Mr Edwin W. Smith.

1926, s. 15.) In Kenya,[1] by the Native Authority Ordinance 1912, power is given to the Governor in Council to establish native local Councils, who, under the chairmanship of the District Commissioner, have a limited power of passing resolutions subject to the approval of the Governor. They may impose rates and administer a fund. So also in Nyasaland a Native Administration Ordinance provides for Advisory Councils to assist principal headmen in the exercise of their jurisdiction, and District Councils for the purpose of advising the Residents. We have already noted the extensive legislative powers which are accorded to the Councils of some of the Principalities of Uganda.

It is in Fiji, however, that this aspect of Indirect Government has received its most marked development. Under the Native Affairs Ordinance, 1876, there is a Native Regulation Board which consists of the Governor, two members of the Legislative Council, and other members nominated by the Government, which has power to make regulations with regard to the marriage and divorce of native Fijians, succession to property, the jurisdiction and powers of civil and criminal courts and also with regard to other matters affecting the good government and well-being of the native population. All such regulations have to receive the sanction of the Legislative Council. Under one of these regulations (No. 3 of 1912) provision is made for District and Provincial Councils with power, subject to the approval of the Governor, to make regulations for the good government and welfare of the native population of their respective districts and provinces.

Further, there is a Great Council of Chiefs which meets from time to time under the presidency of the officer

[1] In Kenya and Nyasaland the fact that these Councils are presided over by officials places them on a lower constitutional level.

charged with the direction of native affairs. It is an advisory body with special powers laid down in Native Regulation No. 3 of 1912, and is opened and closed by the Governor in person. One of the functions of this great Council of Chiefs is to nominate two members of the Legislative Council. The Council submits four, five or six names, and out of these the Governor selects three.

This completes our survey of the legislative institutions which have been evolved by the Colonial Office acting in co-operation with the official and public opinion of the countries for which they are designed.

The Bahamas, Barbados, Jamaica, British Guiana, Cyprus, Fiji, Ceylon, the Straits Settlements, the Malay States, Nigeria, Kenya, Basutoland—this is a long and a diverse list—and it does not include all that might be included. One realises as one runs through the list that these constitutions are individual entities—that they do not conform to any common model and that the countries of the Colonial Service compose a constitutional laboratory, which has received too little attention from the political student. There are indications that these countries in this respect are coming into their own.

The constitutional history of our Colonial Government in these territories may be summarised as follows. There is first the period of the free Assemblies—three of which still survive. Next comes the period of the almost universal establishment of the Official Majority—which is still the general model. Thirdly, there comes the stage when attempts are made to mitigate the Official Majority and to find substitutes for it. Finally there are the East African and Ceylon Reports. The first seeks to group three vast areas under a new super-authority—the Governor General, who is to control a common policy and co-ordinate administrative sources. The second

attempts to displace the Governor from all active functions of Government and to devise a half-way house between Crown Colony Government and that of a self-governing Dominion.

There is one point to be borne in mind. In the countries ruled by the Colonial Office the Legislature *par excellence* is the Crown in Council at London. In all these countries —except Barbados, the Bahamas, Bermuda, British Honduras and the Leeward Islands—the Crown has the prerogative right (in some cases restored to it by special statute) of legislating by Order in Council. That power is always in reserve and the consciousness that in an emergency it may be exercised, and that for constitutional purposes it is frequently exercised, is a circumstance which sensibly affects the political atmosphere of this division of our Empire.

NOTE: For such further developments of the East African constitutional question as may have taken place while these pages were passing through the press, see Note on page xii immediately succeeding the Preface.

CHAPTER VIII

PROTECTORATES AND PROTECTED STATES

I. The Tropical African Protectorates

The Foreign Jurisdiction Act—The foundation of our system of Protectorates—What is the essence of a Protectorate? The British standpoint—The Continental standpoint—The British standpoint assimilated to the Continental: Transference of the Protectorates to the Colonial Office—Orders in Council—High Commissioners become Governors: Kenya a Colony—The South African High Commissionership.

The legal basis of the Crown's jurisdiction: (*a*) Under international law; (*b*) Under municipal law.

Suggested assimilation of Protectorates to Colonies.

II. The Protected States of Malaya

Geographical conspectus of Malaya—(*a*) The Straits Settlements. (*b*) The Federated and Unfederated Malay States. (*c*) Labuan. (*d*) Brunei, Sarawak and North Borneo.

The first Protectorate—Perak—Treaty of 1874—Invention of the British "Adviser"—Extension of the Protectorate system—Federation—The Unfederated States—Review of the system of Government—Effect of Federation—The Federal Council—Working of the Resident system—The position of the Unfederated States: A contrast—The Federal Council remodelled—The Chief Secretary—The *Duff Development Company* case—Brunei—Sarawak and North Borneo.

III. The Pacific Protectorates

Origin of our special jurisdiction in the Pacific—Fiji—Orders in Council—The Protectorates—Legal system.

WE have seen in our previous studies that the normal sphere of Colonial Office Government was a "Colony",[1] administered by a Governor, acting in pursuance of a Royal Commission, and Royal Instructions; assisted by a Colonial Secretary, an Attorney General and other officers, Executive Councillors and a Supreme Court; and exercising the legislative power through a Legislative Council, which in most cases he

[1] The term is used in its extended and popular sense.

himself controlled. To put it more concisely—the realm of the Colonial Office was the Crown Colony.

In the last quarter of the last century a new sphere of responsibility presented itself to the view in the form of the Protectorate, or Protected State. It appears in three separate regions of the Empire—Tropical Africa, Malaya and the Pacific, and its extent has so widened that at the present day the area and population of the Protectorates and Protected States far exceed the area and the population of the Crown Colonies. The realm of the Colonial Office can no longer be described as the Crown Colony.

It would be convenient that we should consider these three groups of Protectorates or Protected States *seriatim* as each has a separate story and is worked on principles of its own, and we will commence with the Protectorates of Tropical Africa.

I. THE TROPICAL AFRICAN PROTECTORATES

Until about forty years ago British territory in Tropical Africa was inconsiderable both in extent and in importance. Settlements on the East there were none, and the settlements on the West consisted chiefly of four small enclaves —the Gambia, Lagos, the Gold Coast and Sierra Leone.[1] On June 26, 1867, the House of Commons had passed its famous resolution:

> That all further extension of territory or responsibilities of Government, or new treaties offering any protection to native tribes, would be inexpedient, and that the object of our policy should be to encourage in the natives the exercise of those qualities, which may render it possible for us more and more to transfer to them the administration of all the Governments with a view to our ultimate withdrawal from all, except probably Sierra Leone.

[1] See Lugard, *The Dual Mandate*, etc., p. 157.

In the intervening period prior to 1884 the four small settlements were grouped and re-grouped, attached and detached and re-attached under a succession of Orders by the Queen in Council, without any apparent continuous policy.

In 1884, however, what is known as the "scramble for Africa" began. In 1884 Germany declared a "Protectorate" over the Cameroons and Togoland. The Berlin Conference met in October of that year. Great Britain, which had secured a virtual monopoly of the trade of the Middle and Lower Niger, declared at the Conference a Protectorate of the region known as the "Oil Rivers" (now part of Southern Nigeria), and a new chapter opened in the history of Africa and the British Empire.

Its distinguishing feature has been the growth of the African Protectorates—Nigeria, Uganda, Kenya, Zanzibar, Nyasaland, Northern Rhodesia, Bechuanaland, Swaziland —not to speak of the important appendices added to other areas of Government, in the Protected Territories of the Gambia, the Gold Coast and Sierra Leone. These new regions were shaped, grouped, amalgamated, endowed with legislative, judicial, and administrative institutions, provided with all the departments and machinery of Government, and subjected to a rule which was in some cases more monarchical than that applied to any Colony. By what process and in virtue of what principle was this accomplished? The process was that of the issue of Orders in Council under the Foreign Jurisdiction Act, and the principle was the paradoxical fiction that all this was being done in various foreign countries for the purpose of regulating and defining a special jurisdiction which had been conferred upon the Crown, expressly or tacitly, by the respective independent rulers of these foreign countries. Nothing could better exemplify our peculiar British method of

constitutional development and on that account the Foreign Jurisdiction Act deserves a brief particular study.

THE FOREIGN JURISDICTION ACT

In interpreting the Foreign Jurisdiction Act we are by the principles of the English law restricted to the actual terms of its text. But as a matter of fact we are acquainted with its history and its actual original object. The story of the text is as follows:

By virtue of certain treaties with Turkey known as "Capitulations" England, in common with other Christian powers, enjoyed a certain consular exterritorial jurisdiction in the Levant. This jurisdiction had been assigned by James I to the Levant Company to be exercised by its consular officers. It was in fact so exercised, and at the same time developed and extended by usage, for some two centuries. In 1825 by 6 Geo. IV, c. 33 the Charter of the Company was extinguished and its consular jurisdiction was transferred to consuls appointed by the Crown. The Act passed to regulate the new situation in 1836 (6 and 7 Will. IV, c. 78) was not considered satisfactory and a certain eminent Counsel, Mr Hope Scott, Q.C., was asked to advise. The highly interesting memorandum which he wrote on the subject, and which is the foundation of our present Act, will be found in Appendix VI in Sir Henry Jenkyns' *British Rule and Jurisdiction beyond the Seas*.

In view of our extensive maritime interests, the numerous places in which our consular exterritorial jurisdiction was recognised and its imminent extension in China, Mr Scott considered that it was of the first importance that the theory of this jurisdiction should be put upon a sound and intelligible constitutional basis. Turkey had

made a grant of legislative[1] and judicial powers to a foreign State to be exercised by that State within Turkish territory. This—so he maintained—constituted a grant by Turkey to that foreign State of a portion of its own sovereignty. Let it be assumed that in the then pending negotiations China conceded to us an island and that by the same treaty she also conceded to us a jurisdiction over British persons and causes within her own ports. How are these two cessions distinguishable? Only by the fact that one cession would involve a surrender of territory and the other would not. Both would be cessions of part of the sovereign power.

Now in the case of a cession or conquest of territory the Crown by its royal prerogative (until Parliament sees fit to exercise its own right) has an absolute monarchical right of legislation with regard to all the ceded or conquered area. In the case supposed, sovereignty of the island and the ceded jurisdiction are held in the same right and on the same constitutional principles. It should, therefore, he submitted, be declared that the Crown's rights for the purpose of regulating both are governed by the same principles. It was important to make it clear that the jurisdiction exercised by our consuls and ambassadors was not exercised by them as delegates of the Sultan, but that the jurisdiction was conceded to the Crown and that it was for the Crown to regulate its exercise.

In pursuance of this advice, it was declared in the first section of the Foreign Jurisdiction Act, 1843:

> It shall be lawful for Her Majesty the Queen to hold exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner, as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

[1] The reference here is to the power of making by-laws possessed by the Levant Company for the regulation of the local commercial community.

In other words, it was declared that for the purpose of regulating the jurisdiction which it had acquired the Crown had an absolute right of legislation. The customary and established method of exercising that right of legislation was by the issue of Orders in Council.

To secure the position of the Crown beyond cavil the Act adopted two expedients, which anyone who has had experience of the drafting of legislation must view with sympathetic appreciation. It declared that if any question arose in any Court as to the existence of any particular jurisdiction in any particular foreign country, the decision of a Secretary of State communicated to the Court should be final (s. 4 of Act of 1890). Further, it provided (s. 11) that every Order in Council made under the Act should be laid before Parliament and should thereupon have effect as if it were enacted in the Act. By the definition section it declared that the word "jurisdiction" as used in the Act included "power".

It is on this Act that our whole system of Government in the Tropical African Protectorates is based. But observe two fundamental things about it:

(1) The jurisdiction intended was primarily a judicial jurisdiction.

(2) It was to be a jurisdiction exercised only over British subjects (or *quasi* subjects).[1]

But observe, on the other hand, that according to the actual text of the Act, no such restrictions were expressed. The jurisdiction was not in terms limited to judicial purposes nor was it confined to British subjects.

[1] I.e. foreign subjects under the protection of Great Britain, such as the Ionian Islanders. This view received the support of Mr Hall; see *op. cit.* p. 221.

THE CYPRUS ORDER IN COUNCIL

For many years these two restrictions were nevertheless duly observed. But in 1878 an event happened which greatly enlarged the practical scope of the Act. Turkey, while retaining her own sovereignty, ceded to Great Britain the administration of the island of Cyprus. The position was one without precedent. The inhabitants of Cyprus, whether Turkish or foreign, did not become British subjects. They retained their existing international status. Here nevertheless, in the very words of the Act, was a "jurisdiction which Her Majesty had acquired within a foreign country". It was necessary to proclaim a scheme of Government. There was nothing in the actual words of the Act to restrict its application to judicial matters or to British subjects. Accordingly on September 14, 1878, an Order in Council under the Foreign Jurisdiction Act was issued which made provision for the Government of the island in all its aspects, administrative, legislative and judicial and which applied to all its inhabitants, whether British subjects or not. For the first time the Act had been utilised for the purpose of enacting a "fundamental law" for a country brought under British rule. This precedent had important consequences when the time came to undertake the framing of schemes of Government for Protectorates and Mandated Territories. An instrument for this purpose lay ready to hand in the Foreign Jurisdiction Act.

WHAT IS THE ESSENCE OF A PROTECTORATE

This being the instrument by which our rule in the Protectorates was to be applied and regulated, let us now enquire what is the nature of a Protectorate. The following is the definition given by Jenkyns:

A British Protectorate is a country which is not within British Dominions, but as regards its foreign relations is under the executive control of the King so that its Government cannot hold direct communication with any other foreign Power nor a foreign Power with that Government.

A similar definition is given by Hall: *Foreign Jurisdiction of the British Crown*, p. 128:

The mark of a Protected State or People, whether civilised or uncivilised, is that it cannot maintain political intercourse with foreign Powers except through or by permission of the protecting State.

The same definition was in substance adopted by Kennedy, L.J. in *R.* v. *the Earl of Crewe* (1910), 2 K.B. on p. 619, and by Lord Haldane in *Sobhuza II.* v. *Miller and others* (1926), A.C. 518. Now there is one thing to be noted, which is of the first importance, and that is that this definition excludes the possibility of the Protectorate being within the actual dominions of the protecting State. In a Protectorate, strictly speaking, the King is not *de jure* the sovereign.[1]

THE BRITISH STANDPOINT

It was this conception of a Protectorate that the British Government at first tenaciously sought to maintain. According to this conception, jurisdiction in a Protectorate could only be exercised over British subjects and over such foreigners as either by themselves or through their own State consented to the jurisdiction. Any power exercised in excess of this would be in the nature of a usurpation,

[1] See per Kennedy, L.J. in *R.* v. *Earl of Crewe*, on p. 620: "What the idea of the Protectorate excludes and the idea of annexation on the other hand would include is that absolute ownership which is signified by the word *Dominium* in Roman law and which perhaps, though not quite satisfactorily, is sometimes described as territorial sovereignty".

except in so far as it was sanctioned by an express treaty with the protected State or community. Protectorates exactly on these lines were set up in 1888 in the East over both Brunei and Sarawak (see Hall, *op. cit.* p. 206). Even when in Tropical Africa we issued charters, extending over immense areas, to the Royal Niger Company in the West and to the Imperial British East African Company in the East, these companies were, by the terms of these charters, restricted in their general rights of administration to such powers as they acquired under the hundreds of treaties which they had made, or were destined to make, with the various native tribes within their respective spheres.[1] In 1889 a general "African Order in Council" was issued which still affected to maintain these principles for the purpose of all Protectorates to which the Order applied. The jurisdiction authorised by the Order was primarily judicial, and applied only to British subjects, or *quasi* subjects, and to foreigners who either of themselves or through their own State submitted to it. It was to be exercised by

[1] The text of one of these treaties, viz. that with the Sultan of Sokoto, will be found in Orr's *The Making of Northern Nigeria*, p. 287. The Sultan purports to cede to what was then the National African Company "my entire rights to the country on both sides of the River Benue and rivers flowing into it throughout my dominions for such distances from its and their banks as they may desire". It would be interesting to know what consideration induced this Sultan, who was a ruler with a great religious prestige, to divest himself of the sovereignty of his dominions. It can hardly have been the "yearly present of goods to the value of 3000 bags of cowries" promised to him by Article 5 of the treaty. Lord Lugard (*The Dual Mandate*, pp. 14–15) observes that the reliance upon these treaties was "a subterfuge unworthy of the high line hitherto taken by Great Britain". He suggests that the Sultan of Sokoto "regarded the subsidy promised to him by the Chartered Company as tribute from a vassal".

Consular Officers acting under the Foreign Office. This, then, was at that time the British view of the nature of a Protectorate.

THE CONTINENTAL STANDPOINT

The standpoint of the continental powers was different. They regarded the Power administering a Protectorate as competent to extend its jurisdiction over all persons within its borders whatever their nationality. Germany in particular provided by law for her Protectorates an elaborate organisation, which was based upon the unrestricted sovereignty of the Emperor.[1]

THE BRITISH STANDPOINT ASSIMILATED TO THE CONTINENTAL: TRANSFERENCE OF THE PROTECTORATES TO THE COLONIAL OFFICE

The British standpoint was, in effect, gradually assimilated to this point of view, and when the time came to take over from the Chartered Companies on the East and West the powers provisionally committed to them, our old scruples were abandoned and the continental standpoint was adopted without reserve. Protectorates had been proclaimed over the Oil Rivers area in 1885, over the Northern regions of Nigeria in 1886 (these being committed to the charge of the Royal Niger Company), over Zanzibar and British East Africa in 1890, Nyasaland and Bechuanaland in 1891, Uganda in 1894–6, the Gambia hinterland in 1894, the Sierra Leone hinterland in 1896, the Northern Territories of the Gold Coast in 1897. At first all these Protectorates (except Bechuanaland) were under the control of the Foreign Office but—note a highly significant development—at various dates between 1900 and 1914 they

[1] See Hall, *International Law*, 5th ed. pp. 126–8.

were all transferred to the Colonial Office. A series of Orders in Council was issued under the Foreign Jurisdiction Act regulating the whole Government and Constitution of these several Protectorates (except that of Zanzibar) in exactly the same way as if they were conquered or ceded Colonies. Each Protectorate was thus endowed with a "fundamental law" and a framework of Government, which could at any time be modified in any particular by the simple process of the issue of a new Order from Downing Street. It gradually came to be realised that in a Protectorate by the issue of an Order in Council the Secretary of State could do anything whatever that any conceivable situation might require.[1]

ORDERS IN COUNCIL

Thus, when Nigeria was taken over by the Colonial Office in 1900, the whole great territory was grouped round the little Colony of Lagos (in area 1/240 of the whole) which became the Colony of Nigeria. The Protectorate of Lagos, and the Niger Coast Protectorate (as the "Oil Rivers" Protectorate was now called) were associated with it, and the whole became the Colony and Protectorate of Southern Nigeria. Northern Nigeria was made a separate Protectorate under a High Commissioner.[2] Finally, when

[1] The versatility of the Order in Council as an administrative instrument is perhaps most signally exemplified by the Kenya and Uganda (Transport) Order in Council, 1925. Under this Order the railways, steamer services, and harbours of Kenya and Uganda are vested in and directly administered by a single High Commissioner, who is, for the time being, the Governor of Kenya. A single Order thus deals simultaneously with two separate spheres of administration.

[2] As an incidental act of homage to the fiction that Sovereignty still remained in the Native Chiefs, and at the same time as an

the time was ripe, the whole of Nigeria was amalgamated under a single Governor, who administers the Colony and the Southern Provinces with the aid of a common Legislature, but himself has autocratic power of legislation so far as the Northern Provinces are concerned.[1] The whole of this has been done by Orders in Council under the Foreign Jurisdiction Act. So also in Sierra Leone—an Order in Council partly under the general powers of the Crown and partly under the Foreign Jurisdiction Act has created a common Legislative Council for both the Colony and the Protectorate. The constitutional powers of the Governor in the Protectorate are provided for by an Order entitled, "Order of the King in Council providing for the exercise of His Majesty's Jurisdiction in the Protectorate of Sierra Leone", and the preamble refers by implication to the Protectorate as a "foreign country".[2] Recent events have indeed brought home to us the significance of the

indication of the nature of the policy of "Indirect Rule", which it was intended to establish, the District Officers in charge of Provinces were styled not Commissioners but "Residents".

[1] See generally for the history of the Nigerian Government, *History of Nigeria*, by A. C. Burns, C.M.G., Deputy Chief Secretary to Government; Allen and Unwin, 1929.

[2] The ordinary form of preamble for such an Order is as follows: "Whereas by the Foreign Jurisdiction Act 1890, it is among other things enacted that it shall be lawful for His Majesty the King to hold exercise and enjoy any jurisdiction which His Majesty now has or may at any time hereafter have within a foreign country, in the same and as ample a manner as if His Majesty had acquired that jurisdiction by the cession or conquest of territory. And whereas by treaty, grant, usage, sufferance and other lawful means His Majesty has power and jurisdiction within the territories known as ——.

"Now therefore His Majesty by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased, by and with the advice of his Privy Council to order, and it is hereby ordered as follows."

fact that the Protectorate of Sierra Leone is a "foreign country". Had it, like the Colony of Sierra Leone, been British soil, it would not have been necessary to pass a special Ordinance in 1927 to abolish the status of slavery.

HIGH COMMISSIONERS BECOME GOVERNORS: KENYA A COLONY

Remnants of the theory that the Protectorates were foreign countries survived in the fact that the heads of the Executive in Northern Nigeria and Nyasaland bore the old Foreign Office title of "High Commissioner". These titles have now disappeared and these officers are styled "Governor". Uganda was originally under a "Commissioner" but his title was changed to "Governor" in 1907. Finally, to indicate the completeness of the process of assimilation, the old East African Protectorate (except for a strip of ten miles along the coast, part of the territory of the Sultan of Zanzibar) was in 1920, by the "Kenya Annexation Order in Council, 1920", converted into the Colony of Kenya. It thereby ceased to be foreign territory, but apart from this circumstance things went on exactly as before.

The old supposition therefore, that any jurisdiction regulated by Order in Council under the Foreign Jurisdiction Act could only be exercised over British subjects, which had received the support of Mr Hall (*Foreign Jurisdiction of the British Crown*, p. 221), must be considered as gone for ever.[1]

[1] See per Kennedy, L.J. in *R.* v. *Earl of Crewe* (1910) 2 K.B. on p. 596: "I think, however, that the interpretation, which has been acted on for so many years in Orders in Council and Proclamations made thereunder, applying the provisions of the Foreign Jurisdiction Act, 1890, to natives of such foreign countries, as well as to British subjects resident in or resorting to such foreign countries, makes it impossible now to adapt the interpretation suggested by Mr Hall".

THE SOUTH AFRICAN HIGH COMMISSIONERSHIP

It would be convenient at this point to consider another group of African Territories—that is to say, those under the jurisdiction of the High Commissioner for South Africa—Basutoland, Bechuanaland and Swaziland.[1] The office of High Commissioner has existed in various forms since 1878, but it is now vested in the Governor-General of the Union of South Africa. The Governor-General, as such, is a purely constitutional ruler. He can only act on the advice of his South African ministers. As High Commissioner, however, he is an autocrat, subject only to the control of the Secretary of State. His special function, and the real reason for his separate existence, is the protection of the native populations. Apart from the three countries I have mentioned, he retains certain protective functions in Southern Rhodesia, where under the Southern Rhodesia Order in Council, 1920, the native reserves were vested, and continue vested in him.

Space does not allow me to enter into a full description of the constitutional arrangements of the countries under the High Commissioner. Each has a history of its own. A brief account of them will be found in the Dominions Office and Colonial Office List. Bechuanaland and Swaziland are Protectorates. Basutoland is under the direct dominion of the Crown. But the distinction makes no real difference. All three are ruled in what may be described as the true spirit of a Protectorate, with the slightest possible administrative staff and with the highest possible regard for native institutions. The High Commissioner is represented in each by a Resident Commissioner, as his chief Executive Officer, and he legislates for all three by

[1] For Swaziland see article in *The Times*, Oct. 22, 1929.

proclamation—with the assistance in Swaziland of a European elected Advisory Council on purely European affairs.

It may here be mentioned that in recent years the "King", or Paramount Chief of the Swazis, Sobhuza II, challenged the action of the High Commissioner with regard to a certain Crown grant, and the assumption of authority by Order in Council on which the grant was based. The matter at issue related to certain concessions to a European Company. But the Privy Council ruled that this assumption of authority by the Crown was an Act of State, with which a British Court could not concern itself.[1]

THE LEGAL BASIS OF THE CROWN'S JURISDICTION

(*a*) Under International Law

The question arises what is the legal basis for the exercise of the Crown's jurisdiction in these African Protectorates. This is a question partly of international, and partly of municipal law. So far as the position of foreigners is concerned it is a question of international law. The

[1] *Sobhuza II.* v. *Miller and others* (1926), A.C. 518. See judgment delivered by Lord Haldane: "It may happen that the protecting power thinks itself called upon to interfere to an extent which may render it difficult to draw the line between a protectorate and possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such an extension may be referred to as an Act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act".

It must be acknowledged that this *ratio decidendi* is far from clear. An Order in Council under the Foreign Jurisdiction Act cannot extend the jurisdiction of the Crown. It can only regulate a jurisdiction already existing.

governing principle here appears to be as follows: By controlling the foreign relations of the protected State the protecting Power prevents any aggrieved foreigner from addressing any remonstrances to the protected State, or exacting redress through his own Government. Foreign powers must therefore seek for redress from the protector. The protector therefore must, as a corollary to his protection, have power to preserve the subjects of foreign States from injury, and to assure them a reasonable measure of security to life and property. In other words, the protecting Power must see that effective Courts of Justice are established in the protected territory, to which aggrieved foreigners might have recourse, and generally that the Government of the country is a good and civilised Government. Correlatively to their right to invoke this jurisdiction foreigners must themselves be amenable to it. This position, though once disputed, seems now to be accepted by Great Britain.[1]

(*b*) Under Municipal Law

Next, as to municipal law—the right to exercise what is equivalent to sovereignty in the protected area may, of course, at any time be challenged in the municipal Courts, and here until recently the position has been far from clear. From what source is this right of protectorship derived? The right cannot be derived from Orders in Council made under the Foreign Jurisdiction Act. These orders do not confer jurisdiction. They only regulate a jurisdiction already existing. Nor is it satisfactory to derive that jurisdiction from treaties made with various native chiefs. These numerous and fragmentary treaties are not in the

[1] See Hall, *International Law*, 5th ed. p. 126. *Ibid. Foreign Jurisdiction of the British Crown*, pp. 218–20. Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 175–6.

same form,[1] nor do they necessarily cover the whole territory. Under the circumstances this assumption of a portion of the sovereignty of the protected area can only be justified as an exercise of the Royal Prerogative. As Mr Hall suggests (*Foreign Jurisdiction of the British Crown*, p. 224):

> There can be no reason why the British Crown in the exercise of its prerogative rights, should not acquire a portion of the territorial sovereignty of a State or tribal community for the purpose of establishing a protectorate, in the same way as it can undoubtedly acquire the whole of such sovereignty by cession or conquest for the purpose of annexing territory to the Empire.

This view has now received judicial confirmation.[2]

The real truth is that whatever may be the essential significance of a Protectorate under other circumstances, a Protectorate exercised over uncivilised tribes or communities is merely a kindly and considerate euphemism for annexation. The theory has, indeed, become a fiction. The difficulty in a modern Protectorate is to find the protected authority. In the process of protection it seems to have disappeared. The theory is reduced *ad absurdum* when the successor of the Paramount Chief, who first was persuaded to invoke the protection of the Crown, is gazetted as a "native authority", with powers and competence strictly limited by the protecting Power and held purely at that Power's pleasure.

[1] See Lugard, *The Dual Mandate*, p. 15, and Hall, *Foreign Jurisdiction*, p. 217. Some of these treaties are embarrassing in form. They purport to convey the whole sovereignty. But this if accepted would mean that the territory ceded was no longer "foreign" and could not be subject to a Protectorate.

[2] See judgment of Kennedy, L.J. in *R.* v. *Earl of Crewe* (1910), 2 K.B. on p. 626: "In assuming a Protectorate the Crown takes to itself powers, which so far as they go, are identical with those which it could have in a conquered country". He cites with concurrence certain passages from Mr Hall in the same context.

These African Protectorates are thus in effect possessions of the Crown. In some cases they are dependencies of Colonies and as such subject to a special *régime*, but the principal Protectorates are governed in exactly the same way as Colonies, with a Governor, Executive Council, Chief Secretary, Attorney General, Treasurer, Courts, and, in some cases, a Legislature on the usual Colonial model.

It may be asked, therefore: Would it not be well to abolish all these Protectorates, to annex their territories, and to proclaim these territories as Colonies? Such a course was in fact suggested by Lord Lugard in his *Dual Mandate* (p. 38). I venture very respectfully to disagree.

The fact that the theory has now become a fiction does not matter. The subjection of these barbarous tribes to civilised authority was part of an inevitable process. It was a process essential to their future development. That this process should have been conducted under the cover of a euphemism is all to the good. And in my opinion that euphemism should be maintained.

In the first place it is far more considerate to the existing "native authorities". The Emirs of Northern Nigeria, the Yoruba chieftains in the South (who reckon back their succession through many generations), the Kabaka of Uganda, and the native chiefs of Bechuanaland, would receive with sorrow and wounded feelings the news that their territories had been annexed to the dominions of the Crown and that they themselves had been converted into British subjects.

In the second place, what designation are these territories to receive? Are they to be called Colonies? The term "Colony" (though in our system it is often peculiarly employed) seems to suggest British settlement. British settlement in some of these regions would not be regarded as an unmixed blessing, nor are all these regions fit for such settlement. Lord Lugard says that the territory could

be taken over under some more appropriate name. But what possible better name could be conceived than "Protectorate"? It breathes the very spirit of trusteeship, and harmonises with the conception of "Mandate" which the League of Nations has brought into being. Personally I should prefer to see the name extended, rather than restricted; I should be glad to see Basutoland—which does not appear to have any recognised description—converted into a Protectorate.

Further, the term "Protectorate" as distinguished from Colony, has a convenience in that it facilitates a gradation of the scheme of Government according to the stage of development of various areas. Protectorates can be more freely handled than Colonies. A particular area may not be ripe for constitutional institutions. The Colony of Nigeria (once known as Lagos), the Southern Provinces of the Protectorate, the Northern Provinces of the Protectorate, are all in different stages of growth. It would not seem so easy to adapt the local legislative institutions to these stages, as it is at present, if these areas were all parts of a single Colonial Territory.

If we abandoned the word "Protectorate" there is in fact no other possible alternative name but "Colony". Certainly "Colony" is a name of a certain dignity—but it should only be applied where this is in harmony with a sufficient body of public feeling—as was presumably the case in Kenya. Our African Protectorates are a happy evolution of our Colonial system,[1] and it is to be hoped that they will long remain under their present designation.

[1] There is one advantage which a Colony possesses and a Protectorate does not. It can raise a loan under the Colonial Stock Act. But this might be easily adjusted by an amendment of the law putting Colonies, Protectorates and Mandated Territories on the same footing.

II. THE PROTECTED STATES OF MALAYA

We now approach the second group of countries that demands our attention. It is that of the Protected States of Malaya. It is convenient to use the term "Protected State" to designate that particular form of Protectorate under which the framework of the State survives intact, as distinguished from Protectorates assumed over uncivilised regions without any effective form of constitutional organisation.

GEOGRAPHICAL CONSPECTUS OF MALAYA

Before we consider the constitutional arrangements of this group of Protected States, it would be well that we should form a general picture of their geographical relations. Certainly they are one of the most extraordinary agglomerations of communities ever concentrated under a common rule.

(*a*) The Straits Settlements

The nucleus of the whole is the Colony of the "Straits Settlements". These "settlements" were once a dependency of our Indian Empire. They were detached from that Empire and converted into a Colony by Act of Parliament in 1867 (29 and 30 Vict. c. 15). They were transferred to the Colonial Office by an Order in Council made in pursuance of the Act, and were equipped with a Governor, a Colonial Secretary, and Attorney General and a Supreme Court.

They consist of five pieces of detached territory (Singapore, Malacca, the Dindings, Province Wellesley and Penang—two of them, Singapore and Penang, being islands) situated at intervals along the west coast of the Malay Peninsula down to its termination at Singapore, from which they are all administered.

(*b*) The Federated and Unfederated Malay States

Lying across the whole peninsula from East to West, and embracing a mountain region in the centre, is a solid block of four States, united in a federation, and styled the "Federated Malay States"—Perak, Selangor, Negri Sembilan (itself a federation of nine smaller "States" as its name implies), and Pahang. This block of federated States is cut off from Singapore by the important unfederated State of Johore—while North of this same block are four other unfederated States—Kedah, Perlis, Kelantan and Trengganu. The whole of these nine States, though remaining under the rule of native Sultans, are controlled from Singapore by the Governor of the Straits Settlements, in his capacity of High Commissioner.

(*c*) Labuan

Nor do these Settlements comprise the whole of his responsibilities. Three and a half days' sail from Singapore is Labuan, an island about the size of the Isle of Wight. This island after some vicissitudes was annexed to the Straits Settlements in 1907 and was created a separate Settlement in 1912. It is administered by a District Officer bearing the title of "Resident", with a very exiguous administrative staff. The Cocos Islands and Christmas Island were also at various dates annexed to the Straits Settlements.

(*d*) Brunei, Sarawak and North Borneo

Finally, on the great island of Borneo, there are three States for which the Government at Singapore has a certain responsibility. They are Brunei, Sarawak and North Borneo, all of which are under British protection. The full

title of the British officer who presides over this singular combination would appear to be Governor and Commander-in-Chief of the Colony of the Straits Settlements, High Commissioner for the Malay States and Brunei, and British Agent for Borneo.[1]

THE FIRST PROTECTORATE—PERAK—INVENTION OF THE BRITISH "ADVISER"

With this general introduction let us return to the Protected States of the Malay Peninsula. It will be seen that we embarked upon the enterprise of their absorption in our usual condition of absence of mind. Our Government had long had relations with these States. Considerations of neighbourhood and commercial interests made this inevitable. In the latter part of the last century most of these States were in a condition of anarchy, insecurity and bankruptcy. In this state of affairs, on September 20, 1873, the Secretary of State, Lord Kimberley, writing to the Governor of the Straits Settlements, Sir Andrew Clarke, ventured on the following suggestion:

> I would ask you especially to consider, whether it would be advisable to appoint a British Officer to reside in any of the States. Such an appointment could of course only be made with the full consent of the Native Government, and the expenses connected with it would have to be defrayed by the Government of the Straits Settlements.[2]

Without waiting for any further authorisation Sir Andrew Clarke approached the Chiefs of Perak, the most important of the States, and on January 20, 1874, concluded with

[1] See Sir Hugh Clifford, *In Court and Kampong* (1927), p. 10, and *Colonial Office and Dominions Office List*, under heading "Brunei".

[2] See Sir F. Swettenham, *British Malaya*, p. 174.

them a treaty.[1] This treaty recited the anarchy and insecurity existing in the kingdom of Perak, the fact that piracy, murder and arson were rife and that British interests in the neighbouring Settlements were affected, that certain of the Perak Chiefs had asked for assistance and that Her Majesty's Government were bound by treaty to protect the said kingdom.[2] The new treaty provided for the appointment of a new Sultan and the pensioning off of the acting Sultan. Its most important article was as follows:

VI. That the Sultan receive and provide a suitable residence for a British Officer to be called Resident, who shall be accredited to his Court, and *whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Customs.*

There was also to be an Assistant Resident and the necessary expense was to be defrayed not by the Colony but by the revenues of Perak. Nothing was said about a Protectorate, or about foreign relations. But a new and comprehensive formula was adopted, which had most important consequences. Sir Andrew Clarke, without knowing it, had invented that significant instrument of British imperial rule—the Adviser.

EXTENSION OF THE PROTECTORATE SYSTEM

The extension of our "protection" to the other States proceeded with the same obliviousness of the principles of international law. Nothing could be more informal than the engagement concluded with the Sultan of Selangor on October 1 of the same year:

As to my friend's request that I will enter into an agreement with my friend in order that my friend may collect all the taxes

[1] *Treaties and Engagements affecting the Malay States and Borneo*, Maxwell and Gibson (1924), p. 28.

[2] The reference is probably to an old treaty with the East India Company of the year 1826. *Ibid.* p. 24.

of my country, I should be very glad if my friend would set my country to right and collect all its taxes.[1]

Space does not permit of a detailed account of the process that now set in. Such an account may be read in the interesting pages of Sir Frank Swettenham (*British Malaya*) and Sir Hugh Clifford (preface to *In Court and Kampong*). British Residents were established in Negri Sembilan and Pahang in 1887 and 1888 respectively and all the four central States were thus brought under British control.

FEDERATION

Wherever the Residents were appointed, they assumed the Government of the country—with little direction from Singapore and without any apparent comprehension at the Colonial Office of what was really taking place. Order resolved itself out of chaos. An immediate advance in security and prosperity took place. The next step was a federation of the four States, which took place in 1895. The heads of all four States severally placed themselves and their States under the protection of the British Government. A "Resident-General" was to be appointed, "as the agent and representative of the British Government under the Governor of the Straits Settlements", who shortly afterwards was endowed with the title of High Commissioner.[2] Without any disturbance of their existing relations with the individual Residents, the four Rulers undertook to follow the advice of the Resident-General "in all matters of administration other than those touching the Mohammedan Religion".

There followed a further astonishing development of agriculture, mining and commerce, of roads and railways,

[1] *Ibid.* p. 35.

[2] Sir Charles Mitchell's Commission of 1897 will be found in Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 237.

of education and public health. The Resident-General was suitably installed at Kuala Lumpur, which became a dignified Federal capital. At the same time Federal departments were created, an admirable Malayan Civil Service —part of the general Colonial Service—was organised, and both the States and the Rulers increased in wealth and prosperity. In 1909, at the instance of Sir John Anderson (for reasons to be subsequently explained), a Federal Council was established under the personal presidency of the High Commissioner and the Resident-General's relation to the head of the Government was somewhat more precisely indicated by changing the name of his office to that of "Chief Secretary to Government".

THE UNFEDERATED STATES

Meanwhile the "unfederated States" came upon the scene. Up to this time the claims of Siam had prevented the inclusion of the northern States of Kedah, Perlis, Kelantan and Trengganu in the general administrative fabric of the peninsula. In 1909 Siam ceded her claims to suzerainty, and thereafter treaties were successively concluded with Kelantan (1910), Trengganu (1910 and 1919) and Kedah (1923) under which the Rulers undertook to receive a British Officer, here called not "Resident" but "Adviser", and to be guided by his advice on all matters other than those "touching the Mohammedan religion", or, as the formula is variously phrased, "relating to Malay custom or the Mohammedan religion". In 1914 Johore, whose position hitherto had been that of a Protected State, to which a consular officer was accredited, fell into line with the general scheme of the peninsula, and received an Adviser, whose advice was to be followed, subject to the usual restriction.

Thus by the year 1923 the whole of the Malay Peninsula, in varying forms, had been brought under the control of the Governor of the Straits Settlements, either in that capacity or in his other capacity of High Commissioner. It may be convenient at this point to pause and to examine the practical working of the Government of this group of Protected States.

REVIEW OF THE SYSTEM OF GOVERNMENT

When the Residents were first appointed, they proceeded perforce to take the whole task of organising and administering the Government into their own hands. They did not, as in Nigeria, superimpose a general British framework of administration and then incorporate the old Rulers into this framework, by gazetting them as "native authorities". They left the constitutional position of the Rulers intact. Nor did they hold the Rulers in tutelage or attempt to govern the country through them. They governed the country themselves. In important matters they consulted and secured the co-operation of the Rulers, whom they were supposed to advise, and they carried out their work of Government through the agency of the existing chiefs and headmen. In spite of this difference of method the spirit in which they acted was nevertheless to a certain extent akin to that of the makers of Nigeria. "Sir Hugh Low"—says Sir Frank Swettenham, speaking of one of these Residents—"understood what others in authority should never forget, that the only way to deal with a Malay people is through their recognised chiefs and headmen. To gain their co-operation it is necessary to show them at least as much consideration as if they were Europeans, and infinitely more patience. Moreover, they should be consulted before taking action, not after."[1] But though

[1] *British Malaya*, p. 253.

there was a certain kinship in spirit, the method, the aim and the result were wholly different. In Malaya the Residents assumed responsibility; in Nigeria they trained the Emirs to assume it and to exercise it aright.[1]

Nevertheless, though the Resident was in real command, there was in every State an institution of great constitutional importance—the State Council, over which the Ruler presided, which the Resident attended, and in which matters of importance were discussed. Up to the time of the federation in 1895 the State Council continued to take an active part in the general control of public affairs, and in legislation.

EFFECT OF FEDERATION

But federation had two unforeseen results. In the first place it impaired the position of the State Councils. Control passed into the hands of the Resident-General, and the administrative functions of the State Council became more and more nominal. Its legislative functions followed the same course. The system was to submit Ordinances in identical form to all four Councils. As it was thought necessary to aim at uniformity, the Ordinances had to be passed as they stood, and the Councils became mere registering bodies. At the same time the establishment of the Resident-General and the creation of the Federal departments restricted the sphere of the Residents. A new authority had been interposed between them and the High Commissioner, and they tended to become the mouthpiece, not of the High Commissioner, but of the Resident-General.

[1] Cf. Lord Lugard, *The Dual Mandate*, pp. 130–1: "The so-called 'Resident' was in fact a Regent, practically uncontrolled by the Governor or Whitehall, governing his 'independent' state by direct personal rule, with or without the co-operation of the native ruler".

THE FEDERAL COUNCIL

It was in the hope of remedying this condition of affairs that Sir John Anderson in 1909 secured the institution of the Federal Council under the presidency of the High Commissioner. He hoped thus to restore to the Rulers and Residents some of the fuller power they had exercised before the federation, to bring the High Commissioner directly into the administration, and to bring both Rulers and Residents into closer personal touch with the High Commissioner.

The Council so established was surely the most singular legislative body ever evolved even by British Colonial Government. It consisted of the High Commissioner in the chair, the Resident-General (or, as he soon became, the Chief Secretary), the four Rulers, the four Residents (whose function it was to advise these Rulers), four unofficial members, and such additional officers and unofficial members as were thought necessary.

In theory what was happening was a process of legislation by the "Rulers of the Federated States in Council". The enacting formula was: "It is hereby enacted by the Rulers of the Federated States in Council". The proceedings were translated or summarised into Malay so that the Rulers might understand them, but in practice it proved impossible for the Rulers to take any effective part in the proceedings. It was not in accordance with their dignity as Sovereign Rulers to argue out questions in public with their own Residents, with the unofficial members, native and European, from their own States, or with heads of departments. As to the State Councils, laws were no longer submitted to them even for registration, and they practically ceased from legislation altogether. Sir John Anderson's hopes were therefore not realised. All that he secured

was closer touch between the individual Rulers and the High Commissioner.[1]

Let us then resume our consideration of the relations between Residents and Rulers and the practical working of the system in which they co-operate.

WORKING OF THE RESIDENT SYSTEM

It is from the office of the Resident that the work of Government is conducted. The Government *Gazette* records not so much the orders and decisions of the Rulers as those of the Residents. The Resident discusses important matters with the Rulers in personal interviews. The extent to which each Ruler is consulted depends upon his personal capacity and his interest in the work of the Government. It would appear then that in effect the Resident is the real Ruler (subject to the Chief Secretary and the High Commissioner), and that the Ruler is a consultant, who is recognised as having a high interest in the affairs of his State.

THE UNFEDERATED STATES— A CONTRAST

So much for the federated States. In the unfederated States, however, which came on the scene at a later stage, the position is quite otherwise. Here there is real indirect Government. The British agents are the "advisers of the Rulers", and, though their advice must in the long run, if necessary, be taken, they really do advise in the spirit of advisers.[2] Everything is discussed in Council and is seri-

[1] See for all this Paper No. 39 of 1925 laid before the Federal Council on December 14, 1926, by command of H.E. the High Commissioner.

[2] Mr Ormsby Gore, Under-Secretary of State, in his *Report* on his visit of 1928 (Cmd. 3235), makes these observations: "I cannot help expressing the view that the spirit and intention

ously considered. If a European officer from the F.M.S. service is appointed for special advisory or administrative functions, his appointment is discussed in Council and he is formally seconded. Each State has its own Secretariat. In Kedah and Trengganu the judges, magistrates and District Officers are Malays. The unfederated Rulers have direct access to the High Commissioner. The State Councils of the unfederated States are thus vital organisms. I cannot do better than quote the words of the late High Commissioner, Sir Lawrence Guillemard, in his extraordinarily interesting State paper already cited (para. 13):

> The British Advisers had to deal with a different type of Ruler from the type of fifty years ago, and they set about this task in a different way. They have never attempted to be anything except advisers. The Advisers and their European staffs, men with experience of Government in other parts of Malaya to guide them, could and did set out to assist the development of the new States along lines in no wise bureaucratic, and for the benefit primarily of the Malays of the State to whose service they were seconded. As a result of this policy British protection has provided in the Unfederated Malay States a very different form of Government from that in the Federated States. The Ruler in the former occupies a position of authority in the Government of his State, and his State Council, under the guidance of European Advisers, has developed into a body of both power and dignity.

THE FEDERAL COUNCIL REMODELLED

The contrast was undoubtedly striking, and in 1927 in the hope of increasing the power of the State Councils and the dignity of the Rulers, the constitution of the Federal

of our policy in Malaya has been carried out both more simply and more completely in the Unfederated States. It is a purely personal view, but I should hope that the Unfederated States will continue as individual entities for a very long time yet. I see no practical or political necessity for urging them to enter the Federation" (p. 18).

Council was remodelled. Two changes were made. First, an attempt was made to decentralise and to increase the importance of the State Councils. Three categories of subjects were drawn up. One consisted of Federal Services, one of State Services, and one of an intermediate class, which can be assigned to the State Councils, as they increase in financial and administrative experience. This involves provision for State Budgets—for which lump sums will be voted annually on a provisional estimate of the Resident. Second, the Rulers withdrew from the Council, and are replaced by four representatives nominated from their own States, all as far as possible Malays. The proceedings are in English and the enacting formula for laws is:

> It is hereby enacted by the Rulers of the Federated Malay States, by and with the advice and consent of the Federal Council.

Each law is signed by the four Rulers before coming into force.[1] All these changes were effected not by an Order in Council but by an agreement between the High Commissioner and the Rulers. The Rulers attend the opening of the Council in State, but instead of taking part in its proceedings discuss the affairs of their States with the High Commissioner at an annual Durbar. It remains to be seen how these new arrangements will develop.

THE CHIEF SECRETARY

A few words as to the Chief Secretary. His position is unique in the Colonial Service. The Resident-General (as he was formerly called) was something more than a Colonial Secretary. In the Federal Treaty of 1895 he was described as "the agent representative of the British Government,

[1] The chief of highest rank signs on behalf of the Federation of Negri Sembilan.

under the Governor of the Straits Settlements". He gave his directions to the Residents in his own name. He had no Executive Council to advise or control him. He was in effect the real federal ruler. The High Commissioner had only general supervisory powers. The Resident-General addressed him not by the submission of minutes, but through formal correspondence. It was the Resident-General, not the High Commissioner, who signed the warrants for expenditure, and he had special functions assigned to him by Statutes, Regulations and General Orders.[1] Sir John Anderson disapproved of his constitutional position, changed his title to "Chief Secretary" and insisted on his communicating with the High Commissioner by the submission of minutes on official papers. At the recent re-arrangement of the constitution Sir Lawrence Guillemard intimated that the changes in contemplation would "in effect amount to abolition of the office of Chief Secretary as at present constituted". Local opinion, however—in particular European opinion—was tenaciously attached to the maintenance of a local head of the executive of high status, and Sir Lawrence Guillemard explained that what he had in mind was not an immediate change but a gradual process of evolution.

Such then is the system of administration of the Pro-

[1] Those who have had practical experience of the Colonial Service will realise the difference between an ordinary Colonial Secretary and this Chief Secretary, if they will refer to s. 9 of the Ordinance regulating the Courts of the F.M.S. (No. 14 of 1918). Its terms are as follows (and let it be borne in mind that "the Chief Judicial Commissioner" is the equivalent of the Chief Justice): "The Chief Secretary to Government may with the approval of the High Commissioner from time to time appoint a fit and proper person to be Chief Judicial Commissioner". One shudders at the thought of a Colonial Secretary appointing a Chief Justice.

tected States of the Malay Peninsula. Observe that, in complete contrast to that of the Protectorates of Tropical Africa, it has been established without any recourse to Orders in Council under the Foreign Jurisdiction Act. Every step has been taken by means of voluntary agreements with the Rulers. Their status as Sovereigns has not been impaired. This was decided in 1894 by the case of *Mighell* v. *The Sultan of Johore*,[1] and that decision has been confirmed by the more recent case of *The Duff Development Co.* v. *the Government of Kelantan*.[2] In defining the position of the Sultan of Kelantan in his letter to the Court Mr Churchill, Secretary of State, declared:

> The Sultan in Council makes laws for the Government of the State, and His Highness dispenses justice through regularly instituted Courts of Justice, confers titles of honour, and generally speaking exercises without question the usual rights of sovereignty.... The present relations between H.M. the King and the Sultan...are those of friendship and protection.... *His Majesty the King does not exercise any rights of sovereignty or jurisdiction over Kelantan.*

It is thus that in its manifold system of Government the Colonial Office accomplishes identical ends by divergent means.

Brunei

It remains to speak of the three Protected States on the Island of Borneo—Brunei, Sarawak and the territory of the British Borneo Company. Protectorate agreements of the orthodox British type and on similar lines were made with all three States in the year 1888. These agreements provided that these States should continue to be governed as independent States under the protection of Great Britain, but that such protection should confer no right on Her Majesty's Government to interfere with their internal

[1] (1894) 2 Q.B. p. 149. [2] (1924) A.C. p. 806.

administration further than was provided in the several agreements. The main points provided for were the control of foreign relations and the cession of territory. In the case of Brunei and Sarawak, the right to determine all questions relating to the succession was also stipulated for. In the case of Brunei consular jurisdiction was provided for British subjects or *quasi* subjects, or foreigners submitting to it. Mixed civil cases in which British subjects or *quasi* subjects were parties, were to be tried in the Courts of the defendant, but an officer appointed by the Government of the plaintiff was to be present as an assessor—an extraordinarily liberal practice.

In 1905–6 the Sultan of Brunei applied for and obtained a supplementary agreement, under which he agreed to receive a British Adviser on the same terms as those in force in the Malay States, "in order that a similar system may be established to that existing in other Malay States now under British Protection".

Sarawak and North Borneo

With regard to the Sarawak and North Borneo Company Protectorates the position is anomalous. According to the common law all territorial rights acquired by a British subject accrue to the Crown. The hereditary Raja of Sarawak, Sir Charles Vyner Brooke, as it is hardly necessary to recite, is a British subject. The claims of the Crown in pursuance of this principle are presumably to be considered as having been waived. The territory of Sarawak is about the same size as England. It is organised as a civilised State, though in some respects on somewhat original lines, and has acquired a certain commercial importance through the discovery and exploitation of an oil field.

The position of the North Borneo Company—the last of the Chartered Companies—is still more anomalous, as it owes its existence to a Charter from the Crown. The State is administered by a Governor approved by the Secretary of State.

As Mr Hall remarks—"it is curious that the 'independent' sovereignty of a company created by Charter should be recognised and that the authority of the Crown within the State of North Borneo should be 'exterritorial'".[1]

This completes our study of the second group of British Protectorates.

III. THE PACIFIC PROTECTORATES

ORIGIN OF OUR SPECIAL JURISDICTION IN THE PACIFIC

We now approach the last of the three groups of British Protectorates—those among the islands of the Pacific Ocean. Our jurisdiction there originated not from any colonisation or conquest, but from a phenomenon which has presented itself in several quarters of the world—the misdeeds and excesses practised by British subjects outside the sphere of civilised Government. Acts of Parliament had from time to time been passed to authorise the trial of such persons who had so acted in particular areas—i.e. those in and adjoining Newfoundland (1699), the Bay of Honduras (1817), various parts of the Pacific (1817 and 1828), the territories adjacent to the Cape up to the 25th parallel (1836) and very extensive regions around Sierra Leone (1861).[2]

The necessity of establishing a special jurisdiction in the Pacific arose out of the kidnapping of the islanders in

[1] Hall, *Foreign Jurisdiction of the British Crown*, p. 207.

[2] For these Acts see Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 142–4.

connection with the labour traffic. There was a difficulty in the way of doing anything effective owing to the absence of a convenient centre. An Act passed in the year 1872 merely provided for obtaining evidence for the purpose of trials in Australia and Tasmania.[1]

FIJI

At length, in 1874, arrangements were made for the cession of Fiji. A colony was thus added to the British Empire and at the same time a centre was provided for suppressing this infamous traffic. In 1875 was passed the Pacific Islanders Protection Act, which amongst other things authorised the establishment of a High Commissioner, with judicial and legislative jurisdiction over British subjects in any of the islands of the Pacific not under British or other civilised rule, and at the same time expressly disclaimed any pretensions of British sovereignty over the islands which the Act affected.[2] The Governor of Fiji was appointed High Commissioner by Order in Council. This was the first instance of an expedient with which experience has since made us familiar—the attachment of a High Commissionership to the Governorship of a Colony, under which the Colony becomes the nucleus of a wider and less definite organisation.

ORDERS IN COUNCIL

In 1878 an amendment of the Foreign Jurisdiction Act[3] gave a general power to the Crown to exercise jurisdiction over British subjects in uncivilised regions, and in 1893

[1] Jenkyns, *op. cit.* p. 145; Fiddes, *The Dominions and Colonial Offices*, pp. 201–2.

[2] Jenkyns, *op. cit.* pp. 145–6; Hall, *Foreign Jurisdiction of the British Crown*, pp. 230–1.

[3] 41 and 42 Vict. c. 67. This provision is now replaced by s. 2 of the Foreign Jurisdiction Act, 1890.

an Order in Council was issued under that Act. It applied also to British Settlements and Protectorates. This Order marked an advance. We have seen that originally Great Britain had in the administration of her Protectorates studiously disclaimed any jurisdiction over natives or foreigners (except in the latter case by consent), but had about this time come to accept the more advanced continental point of view. Accordingly "in an indirect and confused, but sufficient manner",[1] this Order in Council by implication asserted jurisdiction over the native islanders and foreign settlers in British Protectorates. We have realised now that the Foreign Jurisdiction Act does not of itself justify the assertion of such a jurisdiction, but that the Crown is entitled to assert it independently of any enactment by virtue of the Royal Prerogative.[2]

THE PROTECTORATES

What then are the Protectorates under the jurisdiction of the High Commissioner and how is the High Commissionership worked? They are:

(1) The Gilbert and Ellis Islands—Protectorate declared 1892.

(2) The British Solomon Islands—Protectorate declared 1893.

(3) The Tonga Islands—Protectorate declared 1900.

(4) The New Hebrides, which we hold in a sort of condominium by a very inconvenient arrangement with the French under a Convention of 1923 (replacing an earlier Convention of 1906).[3]

[1] Hall, *op. cit.* p. 215. [2] See p. 220, *supra.*

[3] In addition to the above enumerated groups there are the Phoenix Group and Pitcairn Island. The Union Island Group was once within the Gilbert and Ellis Government but in 1925 was transferred to New Zealand.

The Gilbert and Ellis Islands Protectorate on the expressed desire of the native Government was in 1915 by Order in Council converted into a Colony, but we now know from the subsequent example of Kenya that such a change of nomenclature does not make the slightest difference.

The chief care of the High Commissioner are the Gilbert and Ellis and the Solomon Groups. They are administered under his command by a Resident Commissioner for each group, assisted by a scanty subordinate staff. Chief among these are those District Officers who in local isolation sustain the credit of the British Empire throughout the world—four in the Gilbert and Ellis Islands, seven in the Solomon Group. The conditions under which they perform their work were recently brought home to us by the murder of one of them in 1927. The Gilbert and Ellis Islanders speak different languages. They have a code of native laws validated by Ordinance. Medical aid is well organised in the Gilbert Group where every island has a hospital under the charge of a native medical officer.

LEGAL SYSTEM

At Fiji the High Commissioner is assisted by a secretary and clerical staff. The Chief Justice is *ex officio* Chief Judicial Commissioner for the purpose of the sphere of the High Commissionership and acts as voluntary legal adviser to the High Commissioner. Offences on the islands that cannot be dealt with summarily are tried on occasional circuits, or the witnesses and accused persons are brought to Fiji.

With the Tongan Group the High Commissioner has little to do. The islands have had a singular and romantic —almost an operatic history, and interventions have from

time to time proved necessary. At present, to quote Sir George Fiddes (p. 206), they "can boast a royal dynasty (the present monarch is a Queen whose Premier is her Prince Consort), a Parliament with its Speaker, a Privy Council and Ministers. One attribute of civilisation they lack, having no public debt". The High Commissioner is only represented by an "Agent and Consul", and no doubt partly for the purpose of the control of this officer, in accordance with the infinite adaptability of Colonial Office arrangements, the High Commissioner holds the office of Consul General. This circumstance may fittingly conclude our study of the Colonial Office Protectorates.

CHAPTER IX

MANDATED TERRITORIES

Origin of the mandate idea—Classification and allocation of the Mandates—Sphere of the Assembly—British Mandated Territories—Legal basis of administration.

The Cameroons and Togoland—Tanganyika—The East African Commission.

Palestine—Transjordan—Iraq—Nauru. Processes of Mandatory Government—General observations—(*a*) The Annual Reports, (*b*) Sovereignty, (*c*) Terminability of the Mandates.

Appendix—Text of Art. 22 of the Covenant of the League of Nations.

WE have now to address ourselves to the third category of territories for which the Colonial Office is responsible, namely the territories which it administers under a Mandate from the League of Nations. Colonies at various stages of constitutional development, Protectorates, Protected States and Mandated Territories —these together constitute the realm of the Colonial Office. Differing widely as they do in their local circumstances, they are all administered by a common Colonial service and upon common principles.

ORIGIN OF THE MANDATE IDEA

A Mandated Territory is a new conception in the history of the world. It is not a conception which has been carefully thought out in all its implications. It is a conception which developed itself as the result of very imperfect discussions at a time of pressure and its full meaning has been left to work itself out in the course of events.

We shall best understand its meaning and the diverse responsibilities that belong to us in the various territories

of this nature under our care, if we give a brief account of the origin of Article 22 of the Covenant of the League of Nations, on which the whole system of Mandated Territories is based. The text of that Article will be found in the Appendix to the present chapter.

When[1] President Wilson arrived in Paris from America on December 4, 1918, to take part in the Peace Conference, he had formed no idea as to what was to be done with the German Colonies. His reference to the Colonies in the "Fourteen Points" on which the Armistice was based was of the vaguest possible character.[2] Two days later, however, General Smuts published his famous pamphlet, *The League of Nations, a practical suggestion* (Hodder and Stoughton, 1918). This pamphlet raised the whole question of the League of Nations to a higher plane and had a most decisive effect upon the ultimate form of the Covenant. It has many claims to distinction, but this in particular, that therein its author first presented the idea of International Mandates.

The proposal, however, which General Smuts presented differed very greatly from the scheme which was finally adopted. General Smuts had no idea of applying it to the German Colonies. For these Colonies General Smuts contemplated annexation pure and simple. His conception of

[1] The following account is based partly on the narrative of Mr Ray Stannard Baker, contained in his *President Wilson and the World Settlement*, partly on an article by Mr David Hunter Miller, President Wilson's legal adviser, in *Foreign Affairs* for January, 1928, and partly on the same author's *The Drafting of the Covenant*.

[2] "v. A free open-minded and absolutely impartial adjustment of all Colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of the Government, whose title is to be determined."

"Mandates" was intended to deal with the problems presented by the dissolution of the Empires of Austria, Turkey and Russia.

He saw three orders of nations arising which would need the guidance of the League—first, those with full statehood, but standing to the League in a *quasi* filial relationship, as to a conciliating and composing authority; second, those capable of autonomy, but not of complete statehood —such he conceived to be the destiny of the Trans-Caucasian and Trans-Caspian Provinces of Russia and of Syria and Mesopotamia; third, countries requiring "at any rate for some time to come" administration by some external authority. To this class he assigned Palestine and Armenia. Any control or administration which might be necessary in these last two cases was to be the exclusive function of the League, to be exercised, however, not in its corporate capacity (which would be impracticable) but by the appointment of special Mandatory States responsible to the League.

This pamphlet of General Smuts had a very remarkable influence on President Wilson. He carefully copied out with his own typewriter the leading paragraphs of the pamphlet and inserted them almost bodily into the draft of the Covenant which he himself was preparing. He adopted the idea of Mandates with enthusiasm, but brushing aside General Smuts' proposed limitation of the idea, he extended the mandatory system in his own scheme to all the German Colonies. His conception of the mandatory system was at this point of an extremely advanced character. In one of his successive drafts he declared that the object of such "tutelary oversight" should be "to build up...a political unit which can take charge of its own affairs, determine its own connections, and choose its own policies".

These lofty expressions, however, disappeared in the Conference of British and American experts which set itself to work out a common draft, and in this draft (known as the Hurst-Miller Draft) the reference to Mandates was very brief and undeveloped.

At the opening of the Peace Conference, President Wilson secured the first place for the League of Nations and arranged to move at the second plenary sitting of the Conference fixed for January 25, 1919, a resolution affirming the necessity of the establishment of a League of Nations, declaring that it should be treated as an integral part of the general treaty of peace, and appointing a Commission to work out the details.

At this point the proposal to apply a mandatory system to the German Colonies became known to the Premiers of the British Dominions. They protested against it and demanded the direct annexation of the territories which their troops had conquered. They appeared before the Council of Ten and strongly pressed their point of view. At the close of a tumultuous week's discussion a compromise was arrived at, and reduced to the form of a resolution. The substantive portion of this resolution will be found embodied in the first seven paragraphs of Article 22 of the Covenant.[1]

Harmony had been attained by means of a classification. The Mandated Territories were classified and conditions were attached to each class. All the territories conquered by the British Dominions were assigned to a particular class, the conditions attached to which seemed undistinguishable from annexation. It was declared that the territories attached to this class were to be "administered under the laws of the Mandatory as integral portions of

[1] For the full text of Article 22 see the Appendix annexed to this chapter, pp. 280–282.

his territory".[1] The British Premiers on this basis accepted the mandatory principle, and imagined that in surrendering the form of annexation they had retained the substance. Experience has shown, however, that the League's control of this particular class of territory is as effective as its control of the others.

The first six paragraphs of Article 22 were thus the result of the discussion of opposing standpoints, but that discussion was a very imperfect one, as will be realised from the following considerations:

(1) The first class of Mandated Territory was to be that of certain communities formerly belonging to the Turkish Empire, which had reached a stage of development "where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone". The effect of the "Balfour Declaration" with regard to Palestine appears to have been wholly lost sight of. It is obvious that the existence of Palestine as an independent nation could not be even provisionally recognised subject to these conditions, until the effect of the "Balfour Declaration" had been fully worked out—and experience has shown that this is likely to be a long process.

(2) Territories "such as those of Central Africa" were distinguished from other territories, "such as South West Africa and certain of the South Pacific Islands". It is only territories of the latter class that were to be administered as "integral portions" of the territory of the Mandatory. This left out of account the fact that the Cameroons and

[1] When first adopted these words were stronger still. The territories were to be administered "under the laws of the Mandatory State as integral portions *thereof*". This meant annexation pure and simple. But this formula was modified and reduced to its present terms in the final draft of the Covenant.

Togoland were peculiarly qualified to be so administered by reason of that "geographical contiguity" which is put forward as one of the qualifications of South West Africa for this very purpose. This artificial distinction was in fact subsequently disregarded in the working out of the Mandates.

(3) In order to force South West Africa and certain of the South Pacific Islands into a common category, the most extraordinarily inconsistent justifications were adduced. Some territories were to be included in this favourable category on the ground of their "remoteness from the centres of civilisation" and others because of their "geographical contiguity" to the territory of a Mandatory. In other words, some were to be included because they were so near and others because they were so distant.[1]

It is this singular story which explains the peculiar form of the first six paragraphs of Article 22. They are out of harmony with the tone and style of the rest of the Covenant. They are so phrased that they do not themselves define the mandatory system, but indicate the lines on which it should be constructed. The last three paragraphs, however, are of a different character and of the utmost importance. It is due to them that the mandatory system can be made effective. Paragraph 7 requires that the Mandatory shall render an Annual Report to the Council. Paragraph 8 declares that the Council shall define the degree of authority, control and administration which shall be exercised by the Mandatory, and paragraph 9 provides for the establishment of the Permanent Mandates Commission.

[1] A fourth point indicating the imperfections of the discussion is that it is not possible to give any intelligible meaning to the words "if not previously agreed upon by the members of the League" in para. 8.

CLASSIFICATION AND ALLOCATION OF THE MANDATES

This being the history of Article 22 let us now consider how the scheme of the Article was put into operation. It was not left to the Council of the League (as was apparently intended by the Article) to select the Mandatories and itself to originate the terms of the Mandates. Paragraph 2 of the Article suggested as qualifications for the task committed to the Mandatory nations "their resources, their experience and their geographical position". It is plain, however, that these qualifications received little if any attention, and that what really determined the choice of the Mandatories was either the fact of conquest or an arrangement between the Powers specially interested. Paragraph 4, speaking of the communities formerly belonging to the Turkish Empire, declared that "the wishes of these communities must be a principal consideration in the selection of the Mandatory". No attention was in fact paid to this stipulation.

The actual process was as follows: Under the Treaty of Versailles, Germany ceded all her Colonies to the "Principal Allied and Associated Powers", that is to say, the United States, the British Empire, France, Italy and Japan (see Preamble to the Treaty). Article 119 ran in these terms:

> Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her Overseas possessions.

The Treaty of Lausanne dealt with the question somewhat differently. Article 16 of the Treaty runs as follows:

> Turkey hereby renounces all right and titles whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those

over which her sovereignty is recognised by the said Treaty, *the future of these territories and islands being settled or to be settled by the parties concerned.*

The proper course would appear to have been that the Allied and Associated Powers, in the one case, and the "parties concerned" (whoever these might be) in the other, should have placed the rights so acquired at the disposal of the League with a view to the classification and allocation of the Mandates. This was never formally done.

Whatever may have been the original intention when the mandatory principle was first settled, the classification and allocation of the Mandates was in fact made by the Supreme Council. As to their classification they are distributed into classes known as A, B and C Mandates, A Mandates being those relating to territories formerly belonging to the Turkish Empire and referred to in paragraph 4 of Article 22; B Mandates being those relating to Central African territories, referred to in paragraph 5 of the Article; and C Mandates being concerned with the territories conquered by the British Dominions and Japan, which are referred to in paragraph 6 of the Article and which for various diverse reasons were to be administered "as integral portions" of the territories of the various Mandatories. The little island of Nauru is also of this class.

Not only did the Supreme Council classify the Mandates but it also allocated them and the allocation was in fact a matter of course. No other allocation could have been reasonably made. The only questions which required any discussion were the division of the Cameroons and Togoland between Great Britain and France, and the allocation of a small Mandatory Territory to Belgium in the neighbourhood of her own Central African Dominions. Further, the Supreme Council appointed a Committee, under the

Chairmanship of Lord Milner, for the purpose of the drafting of the various Mandates and the terms of these Mandates were submitted to the various Mandatory Powers before they were laid before the Council of the League of Nations.

It is no doubt easy to criticise this method of procedure as not being in accordance with the spirit of Article 22, but in the circumstances of the time it is doubtful whether any other form of procedure could have been adopted. The organisation of the League was hardly sufficiently developed to permit of these processes being undertaken by its Council. The drafting of the Mandates, as might be expected of a Committee presided over by Lord Milner, was admirably executed and was entirely in accordance with the spirit of the conception, and the drafts were in fact submitted to and approved by the Council of the League.

SPHERE OF THE ASSEMBLY

We are not concerned in this course of studies with the constitution and procedure of the League of Nations, but it may be well to note incidentally that though Article 22 refers only to the Council of the League, the Assembly from the beginning, relying upon paragraph 3 of Article 3 of the Covenant,[1] asserted its right to discuss all questions relating to the mandatory system and to make all such recommendations as it thought fit for the consideration of the Council. Though the supreme Mandatory Authority is in fact the Council, the working of the mandatory system has been annually discussed in the Assembly.

[1] "The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world."

BRITISH MANDATED TERRITORIES

With these introductory observations we will proceed to consider *seriatim* the various Mandatory Territories administered by the Colonial Office, and it may here be noted that we are not now concerned with South West Africa, New Guinea and Samoa which were assigned to the Dominions of South Africa, Australia and New Zealand respectively and for which the Secretary of State for the Colonies has no responsibility.

LEGAL BASIS OF ADMINISTRATION

Before we embark on this, however, there is one general question which we may consider. On the basis of what legal authority was Great Britain to undertake the administration of these various territories? No doubt by the Treaty of Peace Act, 1919, our Government had general authority to give effect to the Treaty of Versailles, but it may be questioned whether such general authority would have been regarded as sufficient to justify the issue of Statutory Enactments for the purpose of establishing and carrying on the Government of these new territories. Such an authority could have been given in regard to the various Mandated Territories by a special Act of Parliament, but, as it happened, we had no occasion to consider either of these alternatives. There lay ready to hand for all purposes a perfect instrument in the power of the Crown to issue Orders in Council under the Foreign Jurisdiction Act. By an unquestionable legal right, that is to say, under an international agreement, confirmed by the League of Nations itself, Great Britain possessed jurisdiction within each of the Mandatory Territories assigned to her and she was therefore entitled, under the Foreign Jurisdiction Act, to regulate that jurisdiction, in the same manner as though

she had acquired it by the conquest or cession of territory.[1] The long experience that had been gained by the framing of Orders in Council for the purpose of Cyprus and the Protectorates of Tropical Africa and the Pacific now stood her in good stead, and Orders in Council were readily and effectively issued for the purpose of establishing and defining the Governments and Constitutions of the new territories.

In two cases, however, another procedure was followed. The national susceptibilities of Iraq would not have tolerated the establishment of its Constitution by a British Order in Council. In this case, therefore, the method adopted was that of international agreement—and this precedent was followed in the case of Transjordan.

The Mandated Territories which we have to consider are the following:

(1) The British Sphere of the Cameroons.

(2) The British Sphere of Togoland.

(3) Tanganyika (formerly known as German East Africa).

(4) Palestine.

(5) Transjordan.

(6) Iraq.

(1) and (2) The Cameroons and Togoland

As these territories are of the same nature they may be conveniently considered together. Both the Cameroons and Togoland territories are, so to speak, sandwiched between British and French territories, the Cameroons between the British Protectorate of Nigeria on the North-

[1] See the Foreign Jurisdiction Act, 1890, s. 6, and pp. 207–214, *supra*.

west and French Equatorial Africa on the South-east; Togoland between the Gold Coast, with its dependencies on the West and the French territory of Dahomey on the East. Both these regions were conquered from the Germans by British and French forces during the war, and while the war was still proceeding, and before the idea of Mandates had been conceived, provisional arrangements had been made for their partition between England and France. It was obvious from the first—at any rate as far as our own shares were concerned—that those conquered territories would never be administered as separate entities, but must be incorporated in our adjoining possessions. The Mandates for the Cameroons and Togoland are in very similar terms. They recite the fact that, under the Treaty of Versailles, Germany had renounced all her rights in these territories in favour of the Principal Allied and Associated Powers. They further recite that these Powers had agreed that the Governments of France and Great Britain "should make a joint recommendation to the League of Nations as to the future" of the said territories. This was the most deferential and respectful form of approach to the League of Nations which the Allies adopted. It will be seen that the formulas used in the case of the other Mandates were of a very different nature.

The Mandates further recited that the Governments of France and Great Britain had made recommendations that Mandates should be conferred upon Great Britain for the administration of portions of these respective territories; that they had proposed that these Mandates should be formulated in certain terms and that His Britannic Majesty had agreed to accept the Mandates and undertaken to exercise them on behalf of the League of Nations in accordance with their provisions. The Mandates proceed to declare that the Council of the League of Nations,

confirming the said Mandates, defined their terms in accordance with the Articles following.

The Articles of the Mandates specify the boundaries of the territory dealt with and declare that the Mandatory shall be responsible for the peace, order and good government of the territory, and for the promotion to the utmost of the material and moral well-being and the social progress of the inhabitants. They further declare that the Mandatory shall have full powers of administration and legislation in the area subject to the Mandate.

In connection with the Articles so declaring there is a very important provision. It will be remembered that under Article 22 of the Covenant, it was only in respect of territories which were intended to be granted to the British Dominions and Japan that it was declared that the Mandatory should have power to administer the areas in question as integral parts of his own territory. No such stipulation was made with regard to the Central African territories in respect of which B Mandates were to be issued. As we have pointed out, this distinction had to be ignored in the Mandates for the Cameroons and Togoland. It was provided that the area should be "administered in accordance with the laws of the Mandatory as an integral part of his territory". The Mandatory was authorised to apply his laws to the territory under the Mandate subject to the modifications required by local conditions.

The principal questions dealt with by the Mandates were:

(1) Slavery.
(2) Restriction of military or naval organisation.
(3) Labour.
(4) Traffic in arms, ammunition and spirituous liquor.
(5) Tenure of land.
(6) Equality as between members of the League.
(7) Freedom of conscience.

It was provided that the Mandatory should make to the Council of the League of Nations

an annual Report to the *satisfaction of the Council* containing full information concerning the measures taken to apply the provisions of his Mandate.

To give effect to these Mandates, Orders in Council, under the Foreign Jurisdiction Act, were issued, in the case of the Cameroons on June 26, 1923, and in the case of Togoland on October 11, 1923. Under these Orders in Council arrangements were made for the incorporation of the British sphere of the Cameroons into the administrative framework of Nigeria, and for the incorporation of the British sphere of Togoland into the administrative framework of the Gold Coast and its dependencies. Power was given to the Governments of Nigeria and the Gold Coast to apply their laws to the incorporated areas, and this power subsequently received effect by means of local legislation.

The areas so incorporated are of comparatively small extent. Our sphere of the Cameroons is about 31,000 square miles in area—about the same size as Ireland. Our sphere of Togoland comprises about 1300 square miles or, say, about half the area of Ceylon.

So much for these two territories.

(3) Tanganyika

Tanganyika on the other hand is a highly important territory. In area it is seven times the size of England. It abuts on three other British possessions, and it is its central position which gave occasion to the idea of a British Federated Dominion of East Africa.[1] The Mandate for Tanganyika is in the same general terms as those of the Cameroons and Togoland, but there are certain important differences.

[1] This idea is now more cautiously expressed by the phrase "closer union".

In the recitals, the Principal Allied and Associated Powers make no pretence of making a recommendation to the League as to the future of the territory. They declare in express terms that they themselves have agreed that a Mandate should be conferred upon His Britannic Majesty to administer the area concerned.

Further, while the Mandate by Article 3 declares that the Mandatory is to be responsible for the peace, order and good government of the territory and is to have full powers of legislation and administration, it does not authorise the Mandatory, as in the case of the Cameroons and Togoland, to administer it as an integral part of his territory, but merely declares (Article 10) that he

> shall be authorised to constitute the territory into a customs fiscal and administrative union or federation with the adjacent territories under his own sovereignty or control.

This provision was the basis of the enquiry by the Hilton Young Commission, which resulted in the *Report of the Commission on closer union of the Dependencies of Eastern and Central Africa*, published in 1929 (Cmd. 3234).

It is unnecessary to say that in formulating their proposals the Commissioners have given careful attention to the terms of the Mandate (see Chapter XII of their Report). Their principal proposal is the establishment of a Governor General, who is to have a general supervisory control of the three governorships and is, in fact, to discharge locally the functions at present exercised by the Secretary of State, in so far as these can be conveniently delegated to him, subject always to the ultimate control of the Secretary of State himself. His duty will be in particular to maintain a common native policy, approved by the Secretary of State, throughout the three governorships.

It is obvious that there is nothing here to affect the Mandates system. But the Governor General will have a

further function. He will have to "co-ordinate administrative services of common interest" (p. 150). And here difficulties may arise. The source of possible trouble is a principle which the Mandates Commission have thought it necessary to assert with reference to the British Cameroons and Togoland. That principle is that for the purpose of the annual reports the Mandated Territory should be treated as though it were a financial unit, so that it should be possible to say whether its administration shows a deficit or a surplus, and whether the nature and character of the mandatory's native policy is in accordance with the terms of the Covenant (p. 225).

Now anything in the nature of amalgamation or unification of services must imply the pooling of receipts and expenditure. The Commissioners do not contemplate any immediate unification—but only the establishment of inter-colonial advisory Boards for the purpose of certain services —railways, ports, inland water transport and customs. But they do contemplate that this system may ultimately develop into complete unification—with a common Legislature[1] for the purpose of such unified services. They seem to think that it will prove possible to reconcile this system of complete unification with the treatment of the Mandated Territory as a financial unit. This is a point as to which it is perhaps best to "wait and see".

There are certain incidental difficulties. Thus, as to railways (p. 226), Art. 257 of the Versailles Treaty transfers the railways of the Mandated Territory "to

[1] Such a Legislature would be advisory only, the Government "within any time that can be foreseen" retaining an official majority. The complaint of the late Herr Stresemann, reported in *The Times* of June 25, 1929, that such a common Legislature would be a "political union" and not an "administrative union" would therefore appear to have been misconceived.

the Mandatory Power in its capacity as such". Will it be possible in the face of this provision to administer the railways of East Africa as a single unit with a pooling of receipts and expenditure? The Commissioners think it will.

Then as to defence—the Mandate provides that no native military force shall be organised in the mandated area except for local police purposes and for the defence of the territory (p. 227). Will it be possible under these circumstances to have a unified defence force? It would seem that Kenya troops might be used for the defence of Tanganyika, but no Tanganyika troops for the defence of Kenya. Even this point the Commissioners appear to think capable of solution. But, again, it would be best to "wait and see".

The framework of Government in Tanganyika was established by an Order in Council under the Foreign Jurisdiction Act, dated July 22, 1920. This Order in Council, like similar Orders issued in respect of the African Protectorates, is in effect a fundamental law. Its main headings are: administration, legislation, application of law, and Courts of Justice. It performs the same function in the Mandated Territory as is performed by Letters Patent, Governors' Commissions and Governors' Instructions in Crown Colonies. Under this Order in Council the chief executive officer is the Governor and, in accordance with the ordinary Colonial formula, he is "authorised, empowered and commanded to do and execute all things that belong to his said office".[1] He is personally vested with the power of legislation but by a subsequent Order in Council a Legislative Council with an official majority, on the usual Crown Colony model, has been created to assist him, consisting partly of official, partly of nominated

[1] See p. 20, *supra*.

unofficial members. The unofficial members comprise a banking member with considerable experience in finance; a leading cotton-ginner; two planters; two Indian members (a lawyer and a merchant) and another European who is a member of the Bar in Tanganyika. In the present stage of development of the territory it has not been found possible to nominate an African member.

During the eleventh session of the Permanent Mandates Commission comment was made upon the fact that these Orders in Council contained no reference in their recitals to the fact that the territory was governed under a Mandate from the League of Nations. The Report of the Commission contains the following paragraph:

> The Commission ventures to suggest that specific mention in important Acts of this kind of the fact that the territory is governed under Mandate on behalf of the League of Nations would make its status and the basis of the jurisdiction of the Mandatory power therein clearer.

As a matter of fact, however, this omission in the recitals was a pure oversight. In the Togoland Order in Council, 1923, the recitals of the Mandate are as full and specific as could be desired. Nothing in fact can be more correct than the attitude of Great Britain with regard to the Mandate system.

On one occasion, indeed, Sir Donald Cameron, Governor of Tanganyika, addressing a gathering of native chiefs, and desiring to allay their apprehensions of a possible change of rule somewhere in the future, used words which seemed to suggest that the mandated areas were merged in the general dominion of the British Empire. But these words were frankly retracted and qualified on his personal appearance before the Mandates Commission.

So much for the Central African Mandated Territories.

(4) Palestine

When we come to Palestine we are in an entirely different atmosphere. It will be remembered that the Palestine, Syria and Iraq Mandates were classified as A Mandates. They relate to portions of the old Turkish Empire which are considered to be on a higher stage of civilisation than the territories of Central Africa. They provide for an avowedly provisional state of affairs and look forward to a day when they can be terminated.

But in the forefront of the Palestine Mandate stands an idea which was never mentioned in the Covenant—that of the "Jewish National Home". It affects all parts of the Mandate, including the preamble.

This preamble is itself more peremptory than the preambles of the Mandates we have already considered. The Principal Allied and Associated Powers assume to themselves greater powers. They declare that they themselves have agreed

> to entrust to a Mandatory selected by the said powers, the administration of the territory of Palestine...within such boundaries as may be fixed by them.

They go on to declare that they have agreed that the Mandatory shall be responsible for putting into effect the Balfour Declaration and that they have selected His Britannic Majesty as the Mandatory for Palestine.

The impression one gets on reading the preamble is that the chief aim of this Mandate is to provide for the "Jewish National Home", that the Allied Powers have made all the necessary arrangements for this purpose, and that all that the Council of the League of Nations has to do is formally to adopt them.

It is not possible for me in the space at my disposal, even if I wished to do so, to expound and discuss the idea of

the "National Home". I have merely to point out the prominent place it fills in the Mandate. But there are other special features of the Mandate which require attention.

In the first place we find that throughout the Mandate "the administration of Palestine" is contemplated as something different from the Mandatory. It is referred to as though it were a separate organisation under his direction and as continuing after his ultimate departure. The explanation is of course obvious. The Palestine Mandate belonged to the class which, under the Covenant, was to apply to communities which

> have reached a stage of development where their existence as independent nations can be provisionally recognised, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.

The theory of the Palestine Mandate is thus, that an administration shall be established in Palestine which is not that of the Mandatory power, but which is to be subject to its control and direction. Thus, with regard to the Holy Places, it is contemplated by Article 13 that the Mandatory may enter

> into such arrangements as he may deem reasonable with the Administration for the purpose of carrying the provisions of this Article into effect.

Similarly, by Article 17 the Administration of Palestine is authorised to organise a defence force on a voluntary basis "subject to the supervision of the Mandatory", but may not use this force for purposes other than those specified in the same "without the consent of the Mandatory".

Further, by Article 12 it is declared that the Mandatory shall be entrusted with the control of the foreign relations of Palestine. It is apparently contemplated that there shall be a separate Administration which would otherwise conduct these foreign relations.

It is obvious that this supposed Palestine Administration cannot be set up until the relationship between the Arab and Jewish communities of Palestine has been harmonised and adjusted, and that this consummation is for the time being in the dim distance. At present the Mandatory Power itself conducts the administration of Palestine and is likely long to continue to do so.

Another special feature of the Palestine Mandate is the provision made for the determination of rights and claims in connection with the Holy Places, and rights and claims relating to the different religious communities in Palestine. By Article 14 a special Commission was to be appointed for this purpose, but so thorny is the question that it has not been found possible up to the present date to constitute the Commission.

Another question specially dealt with is that of antiquities. The Mandatory was directed to secure, within twelve months, the enactment of a law based on a series of principles set out in the most explicit detail in the body of the Mandate itself.

Yet another thorny question is mentioned in connection with the termination of the Mandate, which is expressly contemplated in more than one Article. It is declared that on the expiration of the Mandate the old Capitulations of the Ottoman Empire, which are suspended under the terms of the Mandate, shall be revived in full force, unless the Powers whose nationals enjoy them shall have previously renounced the right to their re-establishment. Meanwhile special judicial arrangements are made for cases in which foreigners are interested.

Mandatory Government was set up in Palestine by an Order in Council dated September 1, 1922. Here the head of the Government, as in the special circumstances of the territory is appropriate, is not a Governor, but a High

Commissioner. The Order in Council establishes an administrative organisation complete in all its various spheres. One point of interest may be noted. As the conquest of Palestine was conducted from Egypt as its original base, and as many of its earliest officers were persons of Egyptian experience, it was natural that its provisional Government should be framed on the Egyptian model. At first there was a Chief Secretary, a Legal Secretary, and a Financial Secretary. In Egypt there is no office which corresponds to our own Chief Justice, and there is no legal executive officer with the name and traditions of the Attorney General. So it was at first in Palestine, and the Chief Justice had a status little superior to that of the President of the Egyptian Court of Appeal, ranking below the three Secretaries to Government. These conceptions have now been adjusted to the Colonial Office model and the Chief Justice in Palestine enjoys the same precedence as belongs to him throughout the Colonial Service. The Legal Secretary has become the Attorney General. Other offices have been brought into line and Palestine is now administered in exactly the same way as an ordinary Crown Colony.

It has not proved possible to establish a Legislative Council in Palestine. A Constitution was in fact promulgated on September 1, 1922, but public opinion among the Arab community was such that it was not thought expedient to put it into operation. The Legislative Council was to consist of ten official members, eight nominated unofficial Mohammedan members, two nominated unofficial Christian members and two nominated Jewish members. Under such a constitution the Government would only have been able to control the Council by the assistance of the votes of the two Jewish members. The Constitution was thus on the Cyprus model, the soundness of which is

very questionable. Pending the putting in force of this or some other Constitution, the Governor legislates with the help of an Advisory Council.

(5) Transjordan

The territory of Transjordan is really part of the territory comprised in the Palestine Mandate, but it is on a special footing. Article 25 of that Mandate empowers the Mandatory

> to postpone or withhold application of such provisions of this Mandate as he may consider inapplicable to the existing local conditions and to make such provision for the administration of the territories as he may consider suitable to these conditions.

On September 16, 1922, the Council of the League of Nations approved a British memorandum excluding from application to Transjordan all provisions of the Mandate having reference to the "National Home" and the special position of the Jews and Palestine as well as those referring to the custody of the Holy Places. This in effect means that Transjordan is outside the sphere of the "Jewish National Home".

The status of Transjordan was explained to the Permanent Mandates Commission at its eleventh session by Sir John Shuckburgh, a distinguished member of the Colonial Office:

> It is not part of Palestine but it is part of the area administered by the British Government under the authority of the Palestine Mandate. The special arrangements there really go back to the old controversy about our war time pledges to the Arabs which I have no wish to revive. The point is that on our own interpretation of those pledges the country East of the Jordan—though not the country West of the Jordan—falls within the area in respect of which we promised during the war to recognise and support the independence of the Arabs. Transjordan is in a wholly different position from Palestine and it was considered necessary that special arrangements should be made there.

Some little time after the commencement of the British occupation, the Amir Abdullah, brother of King Feisal of Iraq, was, with the tacit concurrence of the inhabitants, established as Ruler. The arrangement for this purpose was provisional and it proved necessary for the Mandatory Power to intervene and to exercise a certain measure of increased control. The marks of British control were:

(1) Financial direction and political guidance by the British Resident.

(2) A judicial adviser.

(3) An air-camp at Amman to keep the peace.

(4) Control of foreign relations.

Under the stricter *régime* which in recent years has been established by the British Government, considerable progress has been made by the Transjordan authorities and in 1928 the time was considered ripe for a further advance.

A Constitution might have been imposed on Transjordan by Order in Council, but the same course was adopted as was followed in Iraq. The procedure was that of an international agreement, embodied in a treaty, signed at Jerusalem on February 23, 1928.

It is always interesting to see precisely how these things are done.

The treaty recited that His Britannic Majesty was prepared to recognise the existence of an independent Government in Transjordan under the rule of His Highness the Amir of Transjordan on two conditions:

(1) that that Government was constitutional, and

(2) that it placed His Britannic Majesty in a position to fulfil his international obligations under the Mandate.

By Article 2 it declared that

> the powers of legislation and of administration entrusted to His Britannic Majesty as Mandatory for Palestine shall be exercised

in that part of the area known as Transjordan by His Highness the Amir through such constitutional government as is defined and determined in the Organic law of Transjordan.[1]

The foreign relations of the Amir, his administrative financial and fiscal policy, and, to a large extent, his legislative acts, are to be under the control of the Mandatory Government. Great Britain may maintain armed forces in Transjordan (the Amir being responsible for the additional expense involved), and may raise local forces for defence purposes, the expense involved being a charge on local revenues. Special arrangements are to be made for judicial matters affecting foreigners.

These are no doubt very large derogations from sovereignty—but it should be borne in mind that it is recognised in the treaty that Transjordan cannot pay its way and will require grants or loans from the Treasury.

The treaty was subject to ratification by the new Constitutional Government, and the new Constitutional Government was to be deemed to be provisional until the agreement should have been approved.

The first meeting of the Legislative Council of the new Constitutional Government took place on April 2, 1929, and on June 4 the treaty was ratified by a majority vote. Such is the story of the birth of the infant State of Transjordan.

(6) Iraq

The situation of Iraq as a Mandated Territory is a most peculiar one. In this State it was designed that the provision relating to A Mandates in Article 22 of the Covenant

[1] This delegation of authority to the Amir was criticised in the Report of the Mandates Commission in 1928, as being inconsistent with the terms of the Mandate—but the British explanations were accepted by the Council. See *The Times*, April 4, 1929.

should really be put into operation—that is to say, that Iraq should be

provisionally recognised as an independent State subject to the rendering of administrative advice and assistance by a Mandatory until such time as it is able to stand alone.

A draft Mandate of a full and interesting character was in fact drawn up on these lines and its terms were accepted by the British Government,[1] but it was never formally adopted by the League of Nations, and up to this day there is no formal Mandate in respect of Iraq.

The reason for this unexpected development was that a vehement agitation sprang up in Iraq against the proposal to subject the country to a Mandate. The local state of feeling has been explained by Sir Percy Cox, the British High Commissioner (see *Letters of Miss Gertrude Bell*, vol. II, p. 535).

It was extraordinary with what aversion the Mandatory idea had always been regarded in Iraq. The mere terms "Mandatory" and "Mandate" were anathema to them from the first, for the simple reason, I am convinced, that the words translate badly into Arabic, or rather were wrongly rendered in the Arabic press, when they first emerged from the Peace Conference. I assume the term "Mandatory" to have been introduced by its sponsor, President Wilson, in the particular and recognised sense of "one who undertakes to do service for another with regard to property placed in the hands of the other";[2]—the other in this case being the League of Nations, while the Mandate is the contract under which the service is performed. But it was taken in Iraq in its other sense, of "an authoritative requirement as by a sovereign"—two wholly different conceptions.

Miss Bell herself put the matter more briefly and possibly with more correctness (vol. II, p. 644):

The Arabs would not submit to any diminution of their sovereign rights, such as being placed in tutelage under the

[1] Cmd. 1176, 1500 (1921).

[2] In other words—the holder of a Power of Attorney. See for this interpretation p. 277, *subter*.

League of Nations. They are ready to exercise those rights in such a manner as to bind themselves by Treaty to accept advice in return for help.

It was quite impossible for Great Britain to force a Mandate upon a people animated by these ideas. In order to meet the local point of view, Great Britain on October 10, 1922, entered into a treaty with the newly established kingdom of Iraq.[1] Under that treaty Iraq bound herself to Great Britain to do all the things for which Great Britain was to have rendered herself responsible to the League of Nations under the Mandate. Great Britain, at the request of Iraq, undertook to provide Iraq with such advice and assistance as might be required, without prejudice to her national sovereignty. Iraq, in effect, submitted to a control of her foreign relations. The King of Iraq undertook to frame an organic law which should put the Government of the country on a constitutional basis. Great Britain undertook to use her good offices to secure the admission of Iraq to the League of Nations as soon as possible. Four important agreements were annexed to the treaty. The first was a very long and detailed one dealing with the employment of British officials. The second was a military agreement, dealing with the preparations necessary for the purpose of Iraq undertaking her own defence. The third was a judicial agreement[2]—in which particular provisions were made for the rights of foreigners—and the fourth was a financial agreement.

These documents were laid before the Council of the League of Nations and the situation was explained.

Great Britain assured the Council that the purpose of the treaty of alliance was to ensure a complete observance and execution in Iraq of the principles which the accept-

[1] Cmd. 1757 (1922).

[2] This agreement is at present under revision.

ance of the Mandate was intended to secure, and gave a series of undertakings to the Council. The Council accepted these undertakings and took formal note of the situation.

The Council did not in fact resolve that the treaty and the undertakings of Great Britain should be accepted by the League in substitution for a Mandate, but this was what in effect was intended and implied.

Among the undertakings given by Great Britain was an obligation to furnish every year to the satisfaction of the Council a report on the measures taken during the year to carry out the provisions of the treaty of alliance. This report is referred every year to the Permanent Mandates Commission. Great Britain is thus a Mandatory for Iraq in everything but name. These arrangements were concluded at a meeting of the Council at Geneva on September 27, 1924.[1]

The treaty of October 10, 1922, which can be modified only with the consent of the Council of the League, has been subjected to two subsequent revisions—one on the settlement of the Mosul question, on January 28, 1926, and the other on December 14, 1927, under which Great Britain formally recognises Iraq as "an independent Sovereign State", and in other ways consults the national susceptibilities of Iraq. Thus the provision as to Foreign Relations (Act 4), simply declares that there shall be a full and frank consultation between the high contracting parties on all matters of foreign policy which may affect their common interests. In substance, however, the relationship between Great Britain and Iraq remains the same.

The administrative arrangements between Great Britain and Iraq are as follows: by Article 1 of the Agreement with regard to British officials annexed to the treaty of 1922, the Iraq Government agreed to appoint a British official

[1] Cmd. 2317 (1925).

approved by the High Commissioner as and when it might be requested to do so, to any of certain posts enumerated in a schedule. These posts included Advisorships to the Ministers of the Interior, Finance, Justice, Defence and Communications and Works as well as Directors or Inspectors General of the most important technical departments; Directors or Assistant Directors of other departments and the Presidency of the Court of Appeal. Iraq is also free to appoint British officials to a great number of other posts, but all officials so appointed (in the absence of a special contract) are to serve on the terms settled by the agreement. All British officials so appointed are in the service of the Iraq Government and are responsible to that Government and not to the High Commissioner.

The transition from the old arrangements of the military occupation to those of the new *régime* was an extremely interesting one. Under the military occupation there were District Officers throughout the country known as Political Officers. Arab administrative officials took over the duties of these Political Officers and the old Political Officers became the Advisers of their successors under the title of "Administrative Inspectors". There was a similar adjustment with regard to the heads of departments. The duties of Administrative Inspectors were fully defined by a new law known as the "Administrative Inspectors' Regulations, 1923". While the Inspectors were given wide powers, they were required to work under very strictly defined conditions. Article 19 and Article 15 of these Regulations run as follows:

19. "Administrative Inspectors will make their Reports and recommendations, especially when they affect officials and their work with due sense of responsibility and with the knowledge that they will be expected to adduce reasonable grounds for any charges that may be made."

15. "Administrative Inspectors who contravene any of these instructions or any laws or regulations of the Iraq Government will be subject to disciplinary regulations to be devised hereafter."

It was no doubt with a view to consult and allay local susceptibilities and suspicions that these Articles were so framed and they are interesting as showing to what lengths British administration is prepared to go for such purposes. They are also interesting, as showing the frankness and generosity with which British officials are prepared to take over the new rôle, which in more than one quarter of the world imperial development seems destined to assign to them—the rôle of the adviser, in place of that of the autocrat.[1]

(7) Nauru

In conclusion there is one further small territory that must receive a passing remark, and that is the little island of Nauru, in respect of which a Mandate was issued to the British Empire in December, 1920. This Mandate is executed by an agreement between the British Government and the Governments of Australia and New Zealand on a system of rotation. The administration of the first five years was appointed by the Government of Australia. The island is only twelve miles in circumference and is

[1] The arrangements above described are destined to be of a very transitory nature. Under Art. 8 of the Treaty of 1927 Great Britain had undertaken to support the candidature of Iraq for admission to the League of Nations in 1932, "provided the present rate of progress in Iraq is maintained and all goes well in the meantime." The qualifying words caused great local disquietude. In September, 1929, on the recommendation of the late Sir Gilbert Clayton, Great Britain resolved unconditionally to support the admission of Iraq to the League in 1932. This means the end of the Mandate (or quasi-Mandate). See *Report on...Iraq in* 1928. *Colonial No.* 44, and *Policy in Iraq*. Cmd. 3440—issued November 21, 1929.

occupied solely for the purpose of working phosphate deposits. Its population is little over 2000, of whom some 1200 are Europeans. An account of this insignificant territory will be found in the Colonial Office List.

PROCESSES OF MANDATORY GOVERNMENT

From the above account it will have been realised that the establishment and conduct of government in a Mandated Territory involves the following eight processes:

(1) The issue of the Mandate itself.

(2) The issue of an Order in Council under the Foreign Jurisdiction Act, which is in the nature of a fundamental law.

(3) Such local legislation and administrative organisation as may be necessary to supplement the Order in Council.

(4) An annual report by the Mandatory Government to the Council of the League of Nations.

(5) The annual consideration and discussion of this report by the Permanent Mandates Commission.

(6) An annual report by the Permanent Mandates Commission to the Council of the League of Nations, supplemented by such additional observations as the Mandatory Power concerned may see fit to make.

(7) The annual consideration of this report by the Council of the League of Nations.

(8) The annual consideration of the work of the Council and the Permanent Mandates Commission with regard to the Mandated Territories by the whole Assembly of the League of Nations.

It is impossible to consider this great and dignified series of administrative processes without being deeply impressed thereby. Such an international system of Government is

something new in history. Whatever may be said of the results of the war, there is this at least to be placed to its credit. The Mandatory system marks a definite advance in the progress of the Government of the world.

GENERAL OBSERVATIONS

There are three points on which certain concluding observations may fitly be made. They are: firstly, the system of the annual reports by the Mandatories; secondly, the question of sovereignty; and, thirdly, the question of the terminability of the Mandates.

(*a*) The Annual Reports

The annual reports issued on behalf of the British Government with regard to its Mandated Territories are very interesting documents. They are the records of a system of Government which sets itself a very high standard and the authors of these reports approach their task with obvious zeal and enthusiasm. The procedure is that the report is annually sent to the Council and is referred by the Council to the Permanent Mandates Commission. This Commission, which is a body of highly distinguished experts, considers the report in detail, and for this purpose its meetings are attended by some responsible officer of the Mandatory Power who gives oral explanations on points submitted to him, or who himself supplements the report by spontaneous oral observations. In the case of Great Britain, the officer who attends is either a distinguished member of the Colonial Office or is the Governor or High Commissioner of the territory himself. Sir Herbert Samuel, High Commissioner for Palestine, himself set the example of personally attending before the Commission and his example has since been

followed by Sir Donald Cameron, the Governor of Tanganyika.

A word may be said as to the trouble which in 1927 arose on the subject of the questionnaires. When the Mandates for the Central African territories were first issued, it occurred to the Mandates Commission that it would assist the preparation of the annual report by the Mandatory Powers if they enumerated the points upon which they would be most interested to receive information. They therefore on October 12, 1921, addressed to the Mandatory Powers a memorandum in the form of a questionnaire. This questionnaire was a brief, concise, and useful document. The practice adopted in Tanganyika was first to make a general report and then to add a brief appendix dealing with the points in the questionnaire.

Similar questionnaires were issued on August 23, 1922, in respect of Syria and Palestine and were no doubt found useful by the Mandatory Government concerned. In 1926, however, the Commission seemed to have conceived the idea that it would be convenient for the examination of those annual reports if they were reduced to a common form, and for this purpose they prepared a document to be submitted to the Mandatory Powers, responsible for B and C Mandates. It contained no less than 118 interrogatories and some of these interrogatories themselves comprised a series of separate questions. The British Government and certain of the Dominion Governments addressed to the Council emphatic protests against this document. There are those who consider that these protests were framed with unnecessary asperity, that they were not in accordance with the spirit of international courtesy and consideration which is usual in the proceedings of the League of Nations, that they tended to affect the prestige of the Permanent Mandates Commission, and that their

objects could better have been attained in another manner. I do not propose to express any opinion on this point, but I would nevertheless observe that I think that it would have been a misfortune if this form of questionnaire had been adopted. It is quite true that scarcely any information is asked for in the questionnaire that had not been already furnished in the reports of the British Government, but, nevertheless, it is hardly consonant with the dignity of Sovereign Powers administering an international trust that they should be called upon to give an account of their stewardship by means of a long series of searching interrogatories. The object which the Permanent Mandates Commission had in view will no doubt, in accordance with the spirit which always animates the League, be attained in another form.

(*b*) Sovereignty

The second point on which I propose to make some observations is the question of sovereignty. This is a large question which I cannot fully discuss. It will be found ably dealt with in the works of Mr Stoyonovsky.[1] The question is, where does the sovereignty of a Mandated Territory reside? On this subject there has been a persistent controversy between the South African Government and the Permanent Mandates Commission. The Council of the League has perhaps wisely avoided giving a decision on this delicate question. On September 8, 1927, in response to a submission by the Permanent Mandates Commission, it preferred simply to say that

> this relationship...is clearly a new one in international law and for this reason the use of some of the time honoured terminology in the same way as previously is perhaps sometimes inappropriate to the new conditions.

[1] (1) *La Théorie générale des mandats internationaux*, (2) *The Mandate for Palestine*, by J. Stoyonovsky.

If we are briefly to consider the question we must ask ourselves what is the meaning of a Mandatory? It is not a term used in our own system of law. It belongs to the Roman law and has been adopted by that of France.[1] By Article 1984 of the French Civil Code Mandate is defined as "the contract by which one person gives to another called the 'Mandatory', the power of accomplishing in his name one or more acts of legal significance" ("*d'accomplir en son nom un ou plusieurs actes juridiques*"). To put the idea in English phraseology—a Mandatory is the holder of a Power of Attorney.[2] Under the Covenant the Mandatory Power in effect holds a Power of Attorney from the League of Nations. By the express words of Article 22 and the terms of his Mandate, he administers the territory "on behalf of the League" and by paragraph 8 of that Article the degree of authority, control or administration to be exercised by the Mandatory is to be explicitly defined by the Council. To say that a Power, so authorised and so restricted, is the Sovereign of the territory in question seems a peculiar position. It is quite true that such a Power, under the authority given to it, does exercise all the rights usually enjoyed by a sovereign Power, but it exercises them not as Sovereign but on behalf of the League.

Our own position in the matter is both clear and correct. Our principal Mandated Territories are regulated by Orders under the Foreign Jurisdiction Act. We thereby recognise them as foreign territories, not our own. Further, it may be interesting to point out that in the

[1] In this connection it must be borne in mind that the French text of the Covenant is authoritative, and that the French word "Mandat" must presumably be interpreted according to French ideas.

[2] For this interpretation see reference to observations of Sir Percy Cox on the Mandate question in Iraq, p. 268, *supra*.

original draft of the Palestine Mandate it was provided by Article 1 that

> His Britannic Majesty shall have the right to exercise as Mandatory all the powers inherent in the Government of a Sovereign State save as they may be limited by the terms of the present Mandate.

In the final form, however, that provision reads:

> The Mandatory shall have full powers of legislation and of administration save as they may be limited by the terms of this Mandate.

This alteration is surely significant.

If we are to think of sovereignty as a thing passed on from one Power to another by means of documents like a title to land, then it would appear that by the Treaty of Versailles, Germany transferred the sovereignty of her Colonies to the Principal Allied Powers, who included the United States of America, and those Powers have not formally transferred it to any other quarter. What happened to the sovereignty of the Turkish territories renounced by Turkey under the Treaty of Lausanne is very difficult to say.[1] This, however, is certain. Whatever sovereignty was transferred to any Power was held by that Power as a signatory of the Treaty of Versailles, on the conditions of the Mandatory system, as established by that Treaty, and in particular on the conditions of Article 22 of the Covenant, and under an obligation to give effect to the terms of that Article. The absence of any formal transaction of transfer is not therefore of any significance. If one looks at the substance of the thing, it appears to be that the rights of sovereignty are in fact exercised by the Mandatory Powers but on behalf of the League of Nations and as trustees for the well-being and development of the people of the country (see para. 1 of Article 22).

[1] See pp. 249–250.

(c) Terminability of the Mandates

The third question on which I desire to comment is that of the terminability of the Mandates. I shall be very brief as the question is purely academic.

Theoretically, no doubt, in private law a mandate is necessarily terminable. As Mr Stoyonovsky has well argued, it is impossible to imagine a mandate that is not subject to revocation.

In practice, however, even though we assume that the Mandates under the Covenant are of the same nature as those under private law, this does not matter. The authority in which any supposed power of revocation is vested is the Council. The Council can only act by unanimity (see Art. 5 of the Covenant). All the Mandatory Powers (except one) are members of the Council. No revocation therefore could take place without their consent. In effect, then, the Mandates are not so much subject to revocation as to relinquishment.

But, it is true—there is an exception—Belgium is not a permanent member of the Council, and Belgium has a small Mandated area—Ruanda-Urunde. But this again does not matter, for Belgium is entitled to sit as a member of the Council for the purpose of any question by which she is affected, and it would be necessary that Belgium should concur in any proposed change in her Mandatory rights and responsibilities (see Art. 4 of the Covenant).

One thing is certain. Permanency is not an essential condition of the Mandates. The spirit and intention of the Covenant is that they should continue only so long as the nations under mandate are not able to stand alone. Moreover in the case of Palestine the termination of the Mandate is expressly contemplated in the document itself.

One may fittingly conclude this series of lectures by an expression of satisfaction that the British Empire (despite the unfortunate episode of the Dominion Premiers), should have played no inconsiderable part both in introducing the Mandatory idea to the world and in carrying it into effect.

Certainly among all our wide governing activities, there is no work of which this country, as a Colonial and Imperial Power, may be more worthily proud than that which it performs as a Mandatory of the League of Nations.

APPENDIX TO CHAPTER IX

Text of Article 22 of the Covenant

(1) To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

(2) The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

(3) The character of the Mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

(4) Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

(5) Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

(6) There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

(7) In every case of mandate, the Mandatory shall render

to the Council an annual report in reference to the territory committed to its charge.

(8) The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

(9) A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

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